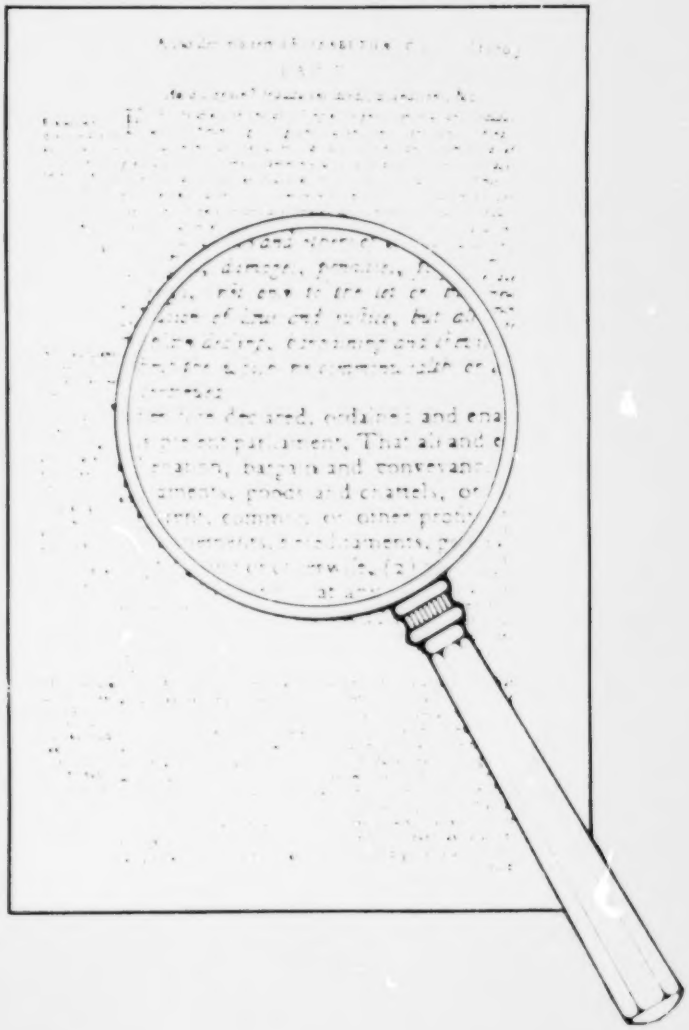
Law Reform
Commission of
Saskatchewan

Proposals for a New Limitation of Actions Act
Report to the Minister of Justice

Saskatchewan



PROPOSALS FOR A NEW LIMITATION OF ACTIONS ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

April 1989

The Law Reform Commission of Saskatchewan was established by **An Act to Establish a Law Reform Commission** proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Mr. Dale G. Linn, B.A., LL.B., Chairman.

Madam Justice Marjorie A. Gerwing

Mr. Gordon J. Kuski, Q.C.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., LL.B. is the Legal Research Officer. The secretary is Miss Wanda Russell.

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The Law Reform Commission Act.

> 6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law....

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Saskatchewan

Law Reform
Commission of
Saskatchewan

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The Honourable Bob Andrew
Minister of Justice
Province of Saskatchewan
REGINA, Saskatchewan

Dear Mr. Minister:

The Commission has completed a study of limitation periods in Saskatchewan. This report recommends enactment of a new Limitation of Actions Act. The new Act would modernize and simplify the law.

It has long been recognized that limitations law in Saskatchewan and other common law jurisdictions is in need of substantial reform. The Saskatchewan Limitation of Actions Act is little more than a compilation of English limitation statutes enacted from the seventeenth to the nineteenth centuries. It makes few concessions to modern developments in the law, such as the Land Titles system and the increasing overlap between remedies available in tort and contract. No provision is made to provide relief for a plaintiff who could not have reasonably discovered that harm has been suffered before a limitation period has run against him. Furthermore, special limitation periods have proliferated in the statutes of Saskatchewan. Some of them are unreasonably short, others are so obscure as to constitute traps for unwary litigants. These, and other, problems have been addressed by the proposed new Act.

The proposals in this report are based on tentative proposals made by the Commission in "Tentative Proposals for Changes in Limitations Legislation Part I: The Effect of Limitations on Title to Real Property" (July, 1981), and "Tentative Proposals for Changes in Limitations Legislation Part II: The Limitation of Actions Act" (May, 1986). Both reports have been reviewed by members of the Saskatchewan Bar, and welcomed as significant improvement in limitations law. It should

also be noted that the Commission has drawn upon recent reforms elsewhere in Canada and the Commonwealth.

Pursuant to section 9 of The Law Reform Commission Act, the Commission submits its report entitled "Proposals for a New Limitation of Actions Act" for your consideration.

Respectfully submitted this 24th day of April, A.D. 1989.

Dale G. Linn,
Chairman.

Madam Justice Marjorie A. Gerwing,
Commissioner.

Gordon J. Kuski, Q.C.,
Commissioner.

PROPOSALS FOR A NEW LIMITATION OF ACTIONS ACT

TABLE OF CONTENTS

I. THE NEED FOR REFORM 1

II. THE COMMISSION'S APPROACH TO REFORM 5

III. APPROPRIATE LIMITATION PERIODS 9

1. Introduction 9
2. Actions Subject to the Proposed Two Year Period 10
   (a) Contract and Tort 10
   (b) Other Actions 13
3. Actions Subject to the Proposed Six Year Period: Debt and Recovery of Chattels 14
   (a) Actions to Recover Debt and Interests in Chattels 14
   (b) Restitutionary Actions 16
   (c) The Residual Limitation Period 18
4. Actions Subject to the Ten Year Limitation Period 18
   (a) Actions to Which the Ten Year Period Will Apply 18
   (b) Actions on Judgments 19
   (c) Trusts 19

IV. REAL PROPERTY ACTIONS 23

1. Introduction 23
2. Title by Adverse Possession 23
3. Mortgages and Agreements for Sale 25

V. THE RUNNING OF TIME: POSTPONEMENT, SUSPENSION AND EXTENSION 30

1. The Hidden Cause of Action 30
2. Absence from the Jurisdiction 33
3. Disabilities: Minority and Mental Incapacity 34
4. Confirmation: Acknowledgement and Part Payment 36

VI. ASSERTION OF STATUTE-BARRED CLAIMS IN OTHER PROCEEDINGS AND AMENDMENT OF PROCEEDINGS 42

1. Set-offs and Counterclaims 42
2. Third Party Proceedings 43
3. Amendment of Pleadings 44

VII. MISCELLANEOUS PROBLEMS 47

1. The Ultimate Limitation Period 47
2. Extinguishment of Right 47
3. Conflict of Laws 49
4. Transition 50

VIII. SPECIAL LIMITATION PERIODS 51

1. General 51
2. Professional Organizations 53
3. Other Public and Quasi-Public Organizations 54
4. Other Causes of Action 57
5. Actions or Remedies Created by Statute 60
6. Notice Provisions 60
7. Insuring Accessability of Limitations Law 62

IX. RECOMMENDATIONS 64

1. The Proposed Act 64
2. Special Limitation Periods to be Repealed 75
3. Special Limitation Periods to be Retained 77
4. Notice Periods to be Repealed 79
5. Amendments to the Queen's Bench Act 79

X. SYNOPSIS OF MAJOR PROPOSALS 80

I. THE NEED FOR REFORM

Statutes of Limitations prescribe a fixed period of time in which an action may be brought. If the action is not brought within this period, and if the limitation period is pleaded as a defence, the action is barred.

The first statute in the common law world to deal comprehensively with limitations was the English Limitation Act of 1623.[1] A number of other limitations statutes were enacted over the next 250 years, and a more or less coherent law of limitations evolved. Those English Statutes that were enacted before July 15, 1870 were received as part of the law of Saskatchewan. In 1931, a major revision was untaken in Canada by the adoption of a Uniform Limitation of Actions Act. The Saskatchewan Limitation of Actions Act of 1932 was based on this document.[2] The Act gathered together the various imperial statutes, as well as some more recent statutory provisions from England and Ontario. A number of section dealing with conditional sales agreements and agreements for sale of land were added in 1933,[3] but the present law in Saskatchewan still bears the heavy imprint of English limitation law.

Limitations law evolved in a piece-meal fashion, and in an age in which the problems encountered by the judicial system were often different from those that are relevant today. The Saskatchewan

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[1] 21 Jac. 1, c. 16.

[2] S.S. 1932, c. 18; now R.S.S. 1978, c. L-15.

[3] S.S. 1933, c. 17.

Limitation of Actions Act shares a preoccupation with estates in land with the older English Statutes. Today such provisions are often no more than a curiosity to lawyers operating within a system dominated by The Land Titles Act. Moreover, the inherited system is complex. The Saskatchewan Act recognizes no fewer than eighteen distinct causes of action grouped into categories to which limitation periods of one year, two years, six years, and ten years apply.[4] In addition, special limitation periods have proliferated in other statutes; no fewer than seventy nine Saskatchewan statutes contain limitation periods in addition to The Limitation of Actions Act.[5]

The need to fundamentally reform limitations law has been widely recognized. In 1967, the New South Wales Law Reform Commission completed a major study on limitations.[6] It contained a draft bill, which was subsequently enacted.[7] The Ontario Law Reform Commission issued a report on limitations in 1969.[8] In 1974, the Law Reform Commission of British Columbia produced a comprehensive report.[9] To a large degree, it built upon the research in Ontario and New South Wales. Its recommendations were adopted by the legislature of British Columbia

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[4] See below.

[5] See the Practice Note published by the Saskatchewan Law Reform Commission, 1986.

[6] First Report of the Limitation of Actions (1967), L.R.C. 3 (hereinafter referred to as the "N.S.W. Report").

[7] S.N.S.W. 1969, Act No. 31.

[8] Report on Limitation of Actions (1969), (hereinafter referred to as the "Ontario report").

[9] Report on Limitations (1974), Project No. 6, (hereinafter referred to as the "B.C. Report").

in 1975.[10] A limitations bill was introduced in the Ontario legislature in 1983, but allowed to die on the order paper.[11] It drew heavily on the British Columbia statute, and departed from the Ontario Commission's recommendations in a number of instances.

The Ontario draft was in turn chosen as the basis for a new Uniform Limitations Act adopted by the Uniform Law Conference in 1979.[12] The Newfoundland Law Reform Commission recently published a working paper that recommended a statute substantially similar to the new Uniform Act.[13] The British Columbia model was also endorsed in a working paper issued in 1976 by the Alberta Institute of Law Research and Reform.[14] In 1986, however, the Institute issued a report on Limitations that embodies an approach quite different from that advocated in its earlier working paper.[15]

The Saskatchewan Law Reform Commission's approach to reform of limitations law has been informed by the work done in other jurisdictions. In particular, the British Columbia Law Reform Commission's proposals and the Uniform Limitations Act have been models

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[10] Limitations Act, S.B.C. 1975, c. 37; now R.S.B.C. 1979, c. 236.

[11] Bill 160, 3rd Sess., 32nd legislature.

[12] Uniform Law Conference of Canada, Proceeding of the Sixty-first Annual Meeting (1979), at 155.

[13] Working Paper on Limitation of Actions (1985), N.L.R.C. - WP 1 (hereafter referred to as the "Newfoundland Report").

[14] Working Paper - Limitation of Actions (1977) (hereafter referred to as the "Alberta Working Paper").

[15] Limitations - Report for Discussion No. 4, September, 1986 (hereafter referred to as the "Alberta Report"). A similar approach was considered, but ultimately rejected by the Commission. See the Commission's Background Paper of Limitation of Actions (1983), Parts A and B. Copies of this unpublished paper may be obtained from the Commission.

for the Saskatchewan Commission's proposals. However, the Commission's "Tentative Proposals for Changes in Limitations Legislation Part II: The Limitation of Actions Act" released in May, 1986 departed from these models in some important respects.

Since the publication of the Tentative Proposals, the Commission has received considerable comment from members of the Bar in Saskatchewan. For the most part, those members of the Bar who commented welcomed the general approach recommended by the Commission as a significant improvement in limitations law. The recommendations contained in this report follow those in the Tentative Proposals closely, but include some changes suggested by members of the Bar and the most recent developments in the law elsewhere in Canada.

II. THE COMMISSION'S APPROACH TO REFORM

Unreformed limitations law has been subjected to several criticisms. Perhaps the most serious problem is the complexity of the system. It is often difficult to identify the appropriate limitation period to apply to a particular cause of action. The proliferation of special limitation periods, many of which are very short, increases the chances that a limitation period will be missed, and an otherwise perfectly valid claim barred in consequence.

A second problem that has long been recognized involves so called "hidden causes of action". The limitation periods contained in the existing statute run from the time when the right to take legal action arises. In some cases, however, a potential plaintiff may not be aware that he has suffered injury until long after the wrong giving rise to the right of action occurs. The courts have sometimes been prepared to extend a limitation period in such cases, but the development of the law in this respect has been uneven and uncertain.

Despite problems in the existing law, it is vitally necessary to the administration of justice to establish clear limitation periods. The primary purpose of limitations is to ensure that actions are commenced within a reasonable time. No one should be indefinitely subject to the threat of a law suit. It may be harsher to allow a dormant claim to be revived than to prevent its resurrection by the imposition of a limitation period. Moreover, it is not in the interests of the community at large that disputes be capable of dragging on interminably. Limitations minimize the disruptive effects of long-unsettled claims. A subsidiary policy justifying limitation of actions

arises from the fact that evidentary problems are likely to become greater as time passes. Limitation rules ensure that litigation is not started so long after the event that adjudication on the merits is impossible.

The Commission has identified three basic approaches that have been taken to reform of limitations law. Most Law Reform bodies recommend retaining a regime of several fixed periods, but would modernize limitation law to reflect developments that have occurred in the last century. The number of limitation periods could be reduced, and where ever possible consolidated in a single statute. The problem of the hidden cause of action would be addressed by permitting an extension of time in cases where the damage is not discovered until after the running of the limitations period. But an "ultimate limitation period" could be retained even in these cases to ensure that there is a final end to claims. This is essentially the approach adopted by the British Columbia Law Reform Commission and the new Uniform Limitation of Actions Act.

The second approach is to provide a single limitation period for all actions. The limitation period would be relatively short, but would not begin to run until the plaintiff had knowledge of the facts upon which his action was based. This could also be subject to an ultimate limitation period that would run from the date of the accrual of the action. The Alberta Report recommends a limitation period of two years after the plaintiff had discovered the existence of the claim, or ten years after accrual of the right of action, which ever is the shorter.

The third approach is to provide fixed periods, but to give discretion to the court to permit an action to procede even though the

limitation period has expired. No jurisdiction has completely embraced such an approach, though some have done so for certain specified actions. Nova Scotia, for example, has recently amended its limitations law to provide that the court may permit the bringing of an action after the expiry of the two year period that applies to most personal actions in the province.[16]

The Commission believes that the problems in the present law can be remedied without eliminating the system of fixed time periods. Introduction of a substantial discretionary element would render limitations law too uncertain. It should be possible in most cases for a potential defendant to know when he need no longer fear an action.

Two arguments have been advanced in favour of discretion. First, discretion can be used to permit damages for a hidden injury to be awarded after the expiration of a limitation period. In the Commission's view, however, this problem can be more satisfactorily resolved by suspending the running of the limitation period until discovery of the injury. The Commission's approach to this problem will be discussed more fully in chapter 4 of this report. Second, discretion is attractive to relieve a plaintiff from the sometimes unfair effect of applying a very short special limitation period. In the Commission's view, however, such special limitation periods should not exist at all. The general public is not unaware of the existence of limitation periods. Potential plaintiffs usually realize that they must take legal action within a reasonable period of time; it is only when the limitation period is unreasonably short that unfairness is apt to result. The Commission's approach to special limitation periods will

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[16] An Act to amend the statute of limitations, S.N.S. 1982, c. 33, s. 2.

be discussed more fully in chapter 5 of this report.

Establishment of a single limitation period would simplify limitations law, and completely eliminate some of the problems that now result from the complexity of the existing system. Some of the distinctions on which identification of the appropriate limitation period now depend are obscure, or appear to rest on no firm policy foundation. Nevertheless, the Commission is of the opinion that more than one limitation period is required. While the traditional distinctions may no longer be appropriate, it is reasonable to establish longer limitation periods for some purposes than others. The rationale for the new limitation periods proposed by the Commission is discussed in chapter 3 of this report.

III. APPROPRIATE LIMITATION PERIODS

1. INTRODUCTION

The Commission is of the opinion that limitation periods of two years, six years and ten years should be retained. To some extent, the choice of time periods is necessarily arbitrary. Periods of three, five and eight years could easily replace the traditional periods. The periods specified in the existing legislation have been retained because they are well known to the legal profession, and because a degree of uniformity with other provinces and other common law jurisdictions will continue to exist if these periods are retained.

The Commission has, however, proposed a significant change in the manner in which limitation periods are assigned to the subject matter of litigation. The present Limitation of Actions Act classifies causes of action according to traditional distinctions, such as that between contract and tort. Increasingly, these distinctions have become blurred. For example, a single transaction is now much more apt to be held by the courts to give rise to an action in both tort and contract than in the past. In place of the traditional classification of causes of action, the Commission recommends that functional criteria be adopted whenever possible. This approach is consistent with practical realities, and will make it possible to considerably simplify the limitations system.

The Commission recommends that the periods of two years, six years, and ten years apply as follows:

Two Years

1. Actions based on contract or tort other than an action specifically covered by some other limitation period.

2. Actions under The Fatal Accident Act.

3. Actions under The Privacy Act.

4. Civil actions by the Crown or any other person to recover a fine or other penalty.

Ten Years

1. Actions on a judgment for payment of money or for the return of personal property.

2. Actions against a personal representative for a share of an estate.

3. Actions against a trustee for fraudulent breach of trust, and for conversion of trust property to his own use.

4. Actions to recover trust property or property into which trust property can be traced.

5. Actions to recovery money on account of a wrongful distribution of trust property against the person to whom it is distributed.

Six Years

1. Actions to recover a debt.

2. Actions for damages for conversion or detention of goods or chattels.

3. Actions for goods or chattels wrongfully taken or detained.

4. Restitutionary actions, other that those based on a constructive trust.

5. All other actions not specifically provided for.

In addition, the Commission proposes that actions that are not subject to any limitation period should be expressly set out in the statute.

2. ACTIONS SUBJECT TO THE PROPOSED TWO YEAR PERIOD

(a) Contract and Tort

The two year limitation period proposed by the Commission would apply to a broad core of personal actions: essentially, all actions in

tort or contract other than actions to recover debt and actions respecting title to property would be subject to the two year period. A short limitations period is justified in these cases because the claim, usually for damages, arises out of a specific injury-causing event or series of events. The potential plaintiff can be expected to pursue his relief within a reasonably short period of time after the event. If he does not do so, it is not unreasonable to bar him from taking action.

At present, the limitation period applying to personal actions depends in part on whether the action is in tort or contract, and in part on the nature of the injury or loss sustained. An action in tort for personal injury is governed by a two year limitation period.[17] Actions in tort for defamation,[18] false imprisonment, malicious prosecution and seduction[19] are also subject to two year periods. Actions for breach of contract are ordinarily subject to a six year limitation period,[20] and tort actions not causing personal injury are subject to a six year period.[21]

The length of the limitation period should not depend on whether the action is framed in contract or tort. The massive expansion of the tort of negligence over the last 50 years has undermined the traditional

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[17] The Limitations Act, s. 3(1)(d) - "Actions for trust past the person, assault, battery, wounding or other personal injury whether in negligence or not...".

[18] Ibid. s. 3(1)(c).

[19] Ibid. s. 3(1)(d).

[20] "Action for recovery of money, whether a debt or damages..." - Ibid. s. 3(1)(f); fraudulent misrepresentation - s. 3(1)(g); mistake "or other equitable grounds" - s. 3(1)(h).

[21] Injury to chattels - Ibid. s. 3(1)(e); recovery of money - s. 3(1)(f).

distinction between tort and contract. Increasingly, actions in contract and in tort co-exist. This is particularly true in the case of actions arising out of professional negligence. The injury in such a case may amount to both a breach of the contract to provide professional advise and services, and the tort of negligence.[22]

Nor does the distinction between injury to the person and injury to property make much functional sense. The same wrongful act may cause both types of damage, yet different periods will apply under the present law. Thus, a victim of an assault may recover damages for his broken watch, but not for his broken nose, after two years have elapsed.

The British Columbia report recommended what amounted to a partial abolition of the old distinction between classes of personal actions. It recommended a two year limitation period applying to any action "for damages in respect of an injured person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty".[23] However, under British Columbia formula, an action for professional negligence or negligent misrepresentation that does not result in physical injury to person or property would still be subject to a six year limitation period. The Commission does not believe that a distinction between negligence causing physical damage and negligence causing economic loss should be drawn. It does not make sense to afford a two year limitation period for action against the architect whose negligence causes a building to collapse, but a six year limitation

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[22] See Nicholas Rafferty, "The Impact of Concurrent Liability in Contract and Torturous Negligence Upon the Running of Limitation Periods" (1983), U.N.D.L.J. 189; Joost Bloom, "The Evolving Relationship Between Contract and Tort", (1985), 10 C.B.L.J. 257.

[23] See the Limitation Act, R.S.B.C. 1979, c. 236, s. 3(1)(b).

period for an action against the lawyer for negligently failing to file a caveat so that his client lost title to the building. Both cases are based upon a duty of care, and should be treated similarly.

Both the Alberta working paper and the Newfoundland report[24] proposed an extension of the British Columbia formula to include in the two year limitation period all actions based on breach of duty of care, whether founded in contract or tort. But even these extensions would leave some inconsistencies. For example, where a misrepresentation made in pre-contractual negotiations induces the contract, an action based on negligent misrepresentation would be governed by a two year limitation period, but an action based on fraudulent misrepresentation would be governed by a six year limitation period.

In the Saskatchewan Commission's opinion, it is time to throw off the distinction between contract and tort entirely as a reason for different periods of limitation. A uniform two year limitation period should apply to all actions in tort or contract, other than those specifically covered by some other limitation period.

(b) Other Actions

The two year period should also apply to actions under the provincial Fatal Accidents Act and Privacy Act. Although such actions are essentially actions in tort, they are created by statute. Specific reference to such actions is intended to avoid ambiguity.

Civil actions to recover a fine or other penalty are also specifically assigned a two year period. Under the present Act, an action by the Crown in such a case is subject to a two year limitation period, and actions by other persons to a one year limitation period.

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[24] Alberta working paper, at 4-10; Newfoundland report, at 34-53.

3. ACTIONS SUBJECT TO THE PROPOSED SIX YEAR PERIOD: DEBT AND RECOVERY OF CHATTELS

(a) Actions to Recover Debt and Interests in Chattels

While the Commission rejects a distinction between contract and tort, a functional distinction between actions for damages and actions for non-payment of debt and detention or conversion of property is appropriate for limitations purposes. The commonly-encountered problems in debt collection make it impractical to expect a creditor to pursue a claim against a debtor by initiating an action as quickly as an accident victim. Similarly, the circumstances that may give rise to a dispute over title to chattels are often not as clearly delineated as those giving rise to a claim for damages. In addition, actions to recover chattels most often arise in modern practice in the course of debt collection. Different limitation periods should not apply to an action on the debt itself, and to an action to recover property that is security for the debt.

While it is true that contractual principles are invoked in respect to actions in debt, and tort law provides the mechanism for protecting rights in property, both deserve to be included in a single special category. It has been noted that:

> Debt, detinue and ouster sound in property and in this respect differ from claims ("in contract" or "in tort") not founded upon deprivation or misappropriation of property. The assessment of damages in property-"contracts" (debt) and in property-"torts" (detinue, ouster) set such "contracts" in a category apart. In both, the property element outweighs the modern affiliation of the legal relation to the domain of contract or, as the case may be, of tort.[25]

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[25] A.V. Levontin, "Debt and Contract in the Common Law" (1966), 1 Isr. L. Rev. 60, at 84.

In the Commission's opinion, actions to recover debt, actions for damages for conversion or detention of goods or chattels, and actions for goods or chattels wrongfully taken or detained should be subject to a six year limitation period. This will establish a uniform limitation period for most commercial and consumer credit matters.

Provision of a six year limitation period for actions involving proprietary interests in chattels and in actions for debt will eliminate an unnecessary complexity in regard to secured debt. Under the present Limitation of Actions Act, an action for debt is barred after six years, but a secured party may have recourse against the property taken in security until ten years have elapsed.[26] In the Commission's view, where a property interest is taken as collateral security, it should be unenforcable when the action for debt is barred.[27]

Two other matters in regard to interests in personal property should also be addressed by new limitations legislation.

Under section 46 of the present Act, right and title to land are extinguished once the limitation period has expired. This provision does not, however, apply to personal property. Strictly, merely the remedy is extinguished; the right (in this case, the title to the goods) is not. While there is some doubt as to the effect of the distinction[28],

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[26] Limitation of Actions Act, s. 39-41.

[27] The existing legislation makes reference to chattel mortgages and conditional sales. The ten year limitation in respect to chattel mortgages was enacted in the 1932 Limitation of Actions Act, and a parallel provision relating to conditional sales agreements added in 1933. Since the introduction of The Personal Property Security Act R.S.S. 1978, c. P-6.1 1981, the chattel mortgage/conditional sales distinction has been obsolete. Obviously, new legislation should instead refer to security agreements, and adopt terminology from The Personal Property Security Act where appropriate.

[28] See J.E. Cote, "Prescription of Titled Chattels" (1969), 7 Alta. L. Rev. 93.

if the title to the property is not extinguished, then a "state of limbo" may result. The "true owner" will not be able to obtain possession of the goods, but the possessor will not be able to transfer good title. This result is unacceptable. Section 46 should be expanded to provide that upon the expiry of the limitation period, any right or title to personal property is extinguished.

There are certain situations in which successive dealings with personal property can give the plaintiff a number of possible actions against different persons. For instance, if A's chattel is converted first by B and then by C, A will be able to sue C for the subsequent conversion even if his remedy against B is statute-barred. This is a serious deficiency in the present law. It provides little protection to bona fide purchasers.

(b) Restitutionary Actions

Restitutionary actions present some special problems. It has been said that "the present restitutionary causes of action fit uncomfortably within the traditional confines of the limitations statutes."[29]

The most common of the traditional restitutionary actions, the action for money had and received, can most logically be classed with actions for debt and conversion. At present, a six year limitation period applies.[30] Similarly, actions for quantum meruit and quantum valebant are presently governed by the six year residual limitation period,[31] and the action for an account is also subject to a six year

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[29] Fridman and McLeod, Restitution, Toronto: Carswell, 1982, at 598.

[30] The Limitation of Actions Act, s. 3(1)(f)(i).

[31] Ibid, s. 3(1)(j).

limitation.[32] In the Commission's opinion, it is appropriate to retain a uniform limitation period for these species of restitution, and to class them with actions for debt.

The law of restitution has, however, undergone rapid development in recent years. It remains very much in an early stage of development. In particular, restitutionary claims based on constructive trust have been extended by the courts. Where the claim is made on the basis of a constructive trust, the court must apply a limitation period by analogy, or if no analogy can be drawn, apply the six year residual period.[33] On the other hand, if the constructive trust is grounded upon a fiduciary relationship that is sufficiently similar to an express trust, and the constructive trustee is in possession of the trust property, it is open to the court to find that the action is not subject to a limitation period at all. It will be recommended below that actions for conversion of trust property should ordinarily be subjected to a ten year limitation period. Thus a restitutionary claim based upon constructive trust would be subject to the ten year period.

It might be argued that since "the principle of unjust enrichment lies at the heart of the constructive trust"[34], the same limitation period should govern constructive trusts as applies to other restitutionary claims. But the constructive trust is also commonly used to settle disputes relating to title to property. A claim may be made on the basis of either resulting trust, constructive trust, or both. It would be unfortunate if a distinction were drawn between these

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[32] Ibid, s. 3(1)(f)(ii).

[33] Ibid, s. 43(2).

[34] Pettkus v Becker, [1980] 2 S.C.R. 834, at 847.

species of trust for limitation purposes. The Commission agrees with the British Columbia Commission that a single limitation period should apply to express, implied and resulting trusts.[35] It should be noted that the equitable limitation rules--the doctrines of laches and acquiesence--will remain available to the court under the Commission's recommendations to cut down on the rather lengthy limitations period afforded to the constructive trust if it is appropriate to do so.

(c) The Residual Limitation Period

The Commission is also of the opinion that a six year "catch all" or residual period for actions not otherwise specifically provided for should be in the new limitations act. A similar six year residual period is established by the existing Limitation of Actions Act. However, many important types of action presently fall into the residual period. In the Commission's opinion, it would be desirable to include as many examples of actions subject to the six year period as possible in the legislation, so that the scope of the residual period would be as small as possible.

4. ACTIONS SUBJECT TO THE TEN YEAR LIMITATION PERIOD

(a) Actions to Which the Ten Year Period Will Apply

The Commission recommends that most actions against a trustee for breach of trust or recovery of trust property, and actions against a personal representative for a share of an estate, be subject to a ten year limitation period. A ten year limitation period would also apply to an action on a judgment for payment of money or for return of

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[35] See Limitations Act, R.S.B.C. 1979, c. 326, s. 3(2).

personal property.

(b) Actions on Judgments

A ten year limitation period presently applies to actions on a judgment for the payment of money. It is appropriate to retain a relatively long limitation period for actions to enforce judgments because of the delay and difficulty almost inevitably encountered in these cases.[36] In any event, an action on a judgment will generally be necessary only to extend the life of a writ of execution for an additional ten year period.[37]

(c) Trusts

The present law of limitations applying to trusts is unsatisfactory. The Limitation of Actions Act contains a number of provisions relating to trustees; these have been consolidated from earlier English statutes, and are often difficult to understand.

Section 42 of the present Act had its origin in the Supreme Court of Judicature Act, 1873.[38] It provides that "subject to the other provisions of this part, no claim of a cestui que trust against his trustee for any property held on express trust, or in respect of a breach of trust, shall be held to be barred by this Act". The provision continues a policy developed in equity. Although equity would

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[36] It is important to distinguish actions on judgments from the right to issue an execution under a judgment. Only the former is caught by the ten year limitation period. The later is essentially a matter of procedure, and governed by the rules of court. Rule 358 of the Queen's Bench Rules provide that a writ of execution remains in force for a period of ten years from the date of the judgment or order.

[37] The Limitation of Actions Act, s. 3(1)(i).

[38] 36 & 37 Vict., c. 66, s. 25(2). Rule one of section 43 of the Queen's Bench Act, R.S.S. 1978, c. Q-1 also codifies this rule.

ordinarily apply limitation periods by analogy, equity refused to admit that breach of trust by an express trustee was analogous to any common law action barred by statute. The 1873 provision reflected that bias. But as part of the general reform of real property law in the nineteenth century, Parliament ultimately extended limitation periods to some breaches of trust, on the theory "that all land titles should be stabilized by limitation periods, and that in general the honest trustee should enjoy with others the ultimate freedom from the possibility of litigation."[39] The English Trustee Act, 1888[40] provided that:

> (1) In this section "trustee" includes an executor, and administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee by a person claiming through him except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use:
>
> (a) all rights and privileges conferred by this Act shall be enjoyed in the same manner and to the same extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee;
>
> (b) if the action is brought to recover money or other property, and is one to which no limitation provision of this Act applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to the action in the same manner and to the same extent as if the claim had been against him in an action for money had and received, but no limitation provisions of this Act shall begin to run against a beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

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[39] Professor Donivan Waters, Law of Trusts in Canada (2nd ed.), Toronto: Carswell, 1984 at 1016.

[40] 51 & 52 Vict., c. 59.

Section 43 of the Saskatchewan Limitation of Actions Act is based on this provision. The fraudulent express trustee is clearly exempted from section 43, as is the trustee who has retained trust property or who has converted it to his own use. In such cases, the beneficiary's claim will not be barred by time. The "honest" express trustee, on the other hand, will usually be protected by the six-year residual limitation period.

Other cases are not so clear. Literal reading of the section would lead one to believe that a constructive trustee who has retained trust property or converted it to his own use will not enjoy the benefit of a limitation period. But such is not necessarily the case. In Soar v Ashwell,[41] the Courts held that the statute should not be given a meaning which altered for the worse the position of constructive trustees in equity. Constructive trustees were sometimes given the benefit of a limitation period running from the time at which the constructive trustee took possession of the property by the courts of equity. It was therefore concluded that the constructive trustees referred to in the statute were only those who could be classed as express trustees in all but name. A trustee de son tort was held to fall into that category in Soar v Ashwell, as would any "person occupying a fiduciary relationship, who has property deposited with him on the strength of such relationship". But this distinction was, as Professor Waters notes "never clearly drawn throughout the nineteenth century, and it is probable that such a distinction can not effectively be drawn."[42]

In the Commission's view, the distinctions which have confused

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[41] [1893] 2 Q.B. 390.

[42] The Law of Trusts in Canada, supra, at 1018.

section 43 of The Limitation of Actions Act are an anachronism, the product of the history of limitations law in nineteenth century England. A good deal of confusion would be eliminated if express, resulting and constructive trustees, and personal representatives, were treated similarly for the purposes of limitation law. This position has been accepted in New South Wales, England and British Columbia.

There is less concensus respecting the position of the fraudulent trustee. The Commission, however, agrees with the position taken by the Ontario Law Reform Commission:

> A beneficiary should not be required to be reasonably diligent in ensuring that the trustee acts properly. The very nature of a trust presupposes a confidence in the trustee. The elderly widow, who is the beneficiary of a trust established under her husband's will, relies on the trustee almost as a friend, she should not be required to guard against him. The Commission has concluded, therefore, that claims for serious breaches of trust should be governed by a limitation period, but that time should run only against the beneficiary when he becomes aware of the breach. The limitation period should be relatively long and the Commission recommends ten years.[43]

Fraudulent breaches of trust and actions for recovery of trust property from trustees should be subject to a ten year limitation period running from the time when the beneficiary becomes fully aware of the breach.

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[43] Ontario Report, at 60.

IV. REAL PROPERTY ACTIONS

1. INTRODUCTION

Nineteenth century English limitation law was preoccupied with real property. That preoccupation was inherited by the Saskatchewan Limitation of Actions Act. No fewer than fifteen sections of the Act are devoted to real property actions. Whether the complexity of the English system was ever really necessary or not, much of it is clearly anachronistic in Saskatchewan today. The striking feature of the transplant of English limitations law to Saskatchewan is the disregard of the predominate position of the Torrens system of land registration in the province.

Some provisions of The Limitations of Actions Act have simply lost their effect. But in some cases the interplay between limitations law and land titles law has led to a "state of limbo" in which one party has possession of land but cannot obtain title, while the other has title but cannot obtain possession.

2. TITLE BY ADVERSE POSSESSION

Section 18 of The Limitation of Actions Act establishes a basic ten year limitation period applicable to "proceedings to recover any land". However, section 17 of the Act provides that the Act is subject to The Land Titles Act. Section 71 of The Land Titles Act provides that:

> After land has been brought under this Act no right, title or interest adverse to or in derrogation of the title or of the rights to possession of the registered owner shall be acquired, or held to have been acquired since December 19, 1913, by the possession of another, and the right of a registered owner to make an entry or to bring an action or suit to recover the land of which he is such registered owner shall not be held to be or to have been

> impaired or effected by any such possession since the said date.[44]

Thus a registered interest in land is not Affected by a limitation period.

The ten year limitation period may still apply, however, to unregistered interests in land. There is land in the province that has not been brought within the land titles system. In addition, life interests and other future estates in land cannot be registered under the Act, but are often created by will or otherwise. If the life interest is protected by a caveat, it will presumably be protected from the limitation period. Otherwise the ten year limitation applies.[45]

The Commission shares the view of the British Columbia Law Reform Commission that all interests in land should, so far as possible, be treated in a similar fashion.[46] Furthermore, the Commission is of the opinion that no limitation period should apply to an action for recovery of land against an adverse possessor. The concept of title by adverse possession may not be inconsistent with the philosophy of the Torrens system,[47] but in Saskatchewan since 1913 no limitation has applied in an

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[44] Originally enacted in An Act to Amend the Land Titles Act, s.s. 1913, c. 30, s. 6. Section 71(1) preserves the rights of adverse possessors who became entitled to the land prior to its registration in the land titles system.

[45] Sections 23-27 of The Limitation of Actions Act apply to future interests, establishing a complex set of rules for determining when the ten year limitation period runs. In addition, a five year limitation period will apply in the case where a person dispossessed of the proceeding estate has been statute barred, and the future interest holder has become entitled to possession.

[46] B.C. Report, at 60-61.

[47] The Alberta Land Titles Act, R.S.A. 1980, c. L-5, s. 74, for example, permits title to be obtained by adverse possession. Some writers have, however, suggested that adverse possession is inconsistent with the Torrens system--J.S. Williams, "Title by Limitation in a Registered Conveyancing System" (1968), 6 Alta. L. Rev. 67.

action by the registered owner of land against the adverse possessor. As one writer has suggested

> Whether or not a jurisdiction should permit one in adverse possession of land to acquire a right to divest the registered ownership is an important socio-economic question.[48]

In Saskatchewan, the duplicate certificate of title has come to be regarded as what one author has called a "sacrosinct document".[49] The Torrens system has eroded the importance of possession as a basis for asserting title to land. Registration is now the key to ownership. Furthermore, since most developed land in the province is within the land titles system, the Commission is of the opinion that it would be appropriate to abandon the notion that possession can create an interest in land. No limitation period should apply to actions for possession of land, whether the land is within the land titles system or not.[50] It should be noted that under this approach, no limitation period would apply to future interests in land.

3. MORTGAGES AND AGREEMENTS FOR SALE

The most difficult problems in applying limitation periods to interests in real property arise in regard to mortgages and agreements for sale.

Section 12 of The Limitation of Actions Act provides that an action to recover any sum of moneys secured by mortgage or otherwise charged

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[48] "Torrens' Elusive Title", (1978) Alta. L. Rev., at 173.

[49] N.J. Goodman, "Adverse Possession of Land--Morality and Motive" (1970), 33 Mod. L. Rev. 281, at 282.

[50] In the "Tentative Proposals for Changes in Limitations Legislation, Part 2: Limitation of Actions Act", it was recommended that a six year limitation apply to possibilities of reverter and rights of entry.

upon or payable out of land must be brought within ten years. Section 33 applies a ten year limitation period to actions for redemption of a mortgage (where the mortgagee is in possession), and to actions for foreclosure or sale.

The status of actions relating to agreements for sale is unclear. In Re Scheidt[51], it was held that the ten year limitation period applicable to actions for possession of land was intended to govern only when title was claimed by adverse possession, and not where the action relates to an agreement for sale. In Turner v Otterman[52] on the other hand, it was held that the ten year limitation period does apply to agreements for sale. Nevertheless, the court also found that "the doctrine of title by prescription is inconsistent with indefeasibility of title [in The Land Titles Act]". Thus, The Limitation of Actions Act cannot operate so as to extinguish the title of the vendor. It follows that while the vendor will not loose title, he will be unable to regain possession. The purchaser, on the other hand, has possession but cannot gain title by virtue of possession alone.[53]

The problem of "title and limbo" does not ordinarily arise in regard to mortgages. A mortgager under the Torrens system retains title of the land: the mortgagee merely obtains a charge on the property. Where the mortgager is in possession and the ten year limitation period governing foreclosure actions has expired, the mortgagor can simply

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[51] (1966), 31 Sask. Bar. Rev. 54, at 59.

[52] (1965), 53 W.W.R. 595.

[53] The purchaser can, apparently, break this circularity by tendering the purchasing price and calling for title: see Jacob Estate v Nieth Estate (1984), 31 Sask. R. 70 (C.A.), holding that the limitation does not run against the purchaser until full purchase price is tendered.

apply to have the mortgage removed from the title.[54] However, when the mortgagee is in possession and the period for redemption has expired, the same procedure does not apply. The mortgagee does not have title to the land. It is likely that the court, relying on indefeasibility of title under the land titles system, would hold that the mortgagor is still entitled to recover the land. Thus, the ten year period for redemption actions is probably a dead letter.

A "state of limbo" may arise in one other unusual circumstance in regard to either a mortgage or agreement for sale. If a dispossessed mortgagor has disappeared, the mortgagee will presumably be unable to obtain clear title. Similarly, if the vendor under an agreement for sale can no longer be located, the purchaser can not obtain title because there is no one to whom price can be tendered

This state of the law is intolerable. Limitations law and land titles law should be harmonized. The law must be changed so that title to land can never be "in a state of limbo".

In the Commission's opinion, a limitation period should apply to both actions by a mortgagee against a mortgagor in possession, and by a mortgagor against a mortgagee in possession. Further, the Commission is of the opinion that the same limitation period should apply to all charges, whether on land or on personal property, and that that period should be six years--the same as that for an action for recovery of an ordinary debt. Adoption of this policy in respect to mortgages will not, however, eliminate all the problems created by the existing law. When the limitation period has run against a mortgagee, the mortgagor will continue to have to the right to apply to court to have the

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[54] See Re Hadwin (1954) 12 W.W.R. (N.S.) 414 (C.A.).

mortgage removed from title, but a limitation period in itself will not give title to a mortgagee in possession after time has run against a mortgagor. That problem can be solved by creating a right in the mortgagee in possession to obtain title to the land by court order.

The policy recommended in regard to mortgages is not appropriate in regard to agreements for sale. The Commission has concluded that no limitation period should apply to actions under agreements for sale. The vendor should be able at any time to bring an action for cancellation of the agreement and regain possession of the land. The purchaser should be able, at any time before cancellation proceedings are concluded, to tender the full purchase price and have the land transferred to him. For this purpose, the purchase price should be the principle owing together with interest accruing for the six year period following the date the last payment under the agreement became due; otherwise, a vendor who neglected his rights for many years could claim a prohibitive accumulation of compound interest. This approach will largely avoid the problem of "title in limbo". However, to deal with the anomalous case where the vendor can no longer be located, provision should be made for payment of the purchase price into court by the purchaser in order to obtain title.

This solution to the problem of the agreement for sale is not entirely satisfactory. At first blush, it might appear attractive to apply the same limitation period to an agreement for sale as to a sale and mortgage back. However, in the Commission's opinion such a policy would not be in harmony with the expectations of those who enter into agreements for sale. Because the duplicate certificate of title is regarded as a "Sacrosinct document", it has altered the way people think

about land. The agreement for sale is attractive to many vendors because the presumably indefeasible title is retained in the vendor's hands until the land is paid for.

V. THE RUNNING OF TIME: POSTPONEMENT, SUSPENSION AND EXTENSION

1. THE HIDDEN CAUSE OF ACTION

Under the present law, time ordinarily begins to run as soon as all the elements necessary for a civil claim exist. The Limitation of Actions Act does provide that where the wrong doer fraudulently conceals the wrong, the cause of action is deemed to have arisen when the fraud was first known or discovered.[55] But this provision provides no relief when a limiation period has run because a latent disease or injury was sustained, but unknown to the potential plaintiff until it was too late.

A classic example of the harshness of traditional limitation law in this regard came to light in the noted House of Lords decision in Cartledge v E. Jopling and Sons, Ltd..[56] One of the plaintiffs in that case was employed in a factory from 1939 to 1950 in which inadequate ventilation existed. He contracted pneumomoconiosis, an industrial disease that gives no indication of its presence in the early stages. By the time the disease was discovered, the limitation period had expired. The House of Lords could find no grounds for relieving against the limitation period.

Legislation has been adopted in England providing a three year limitation period that begins to run in such cases only from the date of knowledge of the injured person.[57] In Canada, the courts have

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[55] Limitation of Actions Act, s. 4.

[56] [1963] 1 All E.R. 341.

[57] Limitations Act, 1980, c. 58, s. 11-14, 33. This legislation superseded a poorly drafted provision with similar intent: the Limitations Act, 1975, c. 54.

recently applied a similar "discovery rule" in certain circumstances. For example, in Consumers Glass Company Ltd. v Foundation Co. of Canada Ltd.[58], the court held that in an action for professional negligence the time does not begin to run until there is a reasonable opportunity to discover the facts.[59]

Manitoba has adopted legislation based on the English model.[60] Nova Scotia, on the other hand, has adopted a judicial discretion to relieve against the running of limitation periods.[61] The British Columbia Limitations Act provides that:

> The running of time with respect to the limitation periods fixed by this Act for an action...is postponed and the time does not commence to run against a plaintiff until the identity of the defendants is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advise a reasonable man would seek on those facts, would regard those facts as showing that (i) an action on the cause of action would, apart from the effect of the exploration of a limitation period, have reasonable prospect of success; and (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account to be able to bring an action.[62]

The wording of the British Columbia provision is rather obscure. For that reason the Uniform Law Conference has accepted a modification contained in the Alberta working paper. The Uniform Act provides (s. 13(2)):

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[58] (1985), 51 O.R. (2nd) 385.

[59] On the other hand, in Camlooes v Nielsen (1984), 10 Der. (4th) 641, the Supreme Court of Canada held that the Cartledg case is still good law at least so far as physical damage in building contract cases is concerned.

[60] S.M. 1966-67, c. 32; S.M. 1980, c. 28.

[61] S.N.S. 1982, c. 33, s. 2.

[62] R.S.B.C. 1979, c. 236, s. 6.

> The running of the limitation period... is postponed until the plaintiff knows or, in all circumstances of the case, he ought to know:
>
> (a) the identity of the defendant; and
>
> (b) the facts upon which his action is founded.

However, under this provision, but not the British Columbia provision, the time begins to run as soon as the plaintiff becomes aware of damage or injury, even though the injury appeared to be trivial when first discovered. In the Commission's opinion, time should not run until the plaintiff knew or ought to have known:

(a) the identity of the defendant;

(b) the facts upon which the action is founded; and

(c) that the injury suffered was significant.

In England, a straight forward test of what constitutes "significant injury" has been adopted. Time begins to run under the English statute when the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgement. On this approach, a plaintiff would not be penalized for failing to take action when the first trivial evidence of an injury became known to him. It is necessary, nonetheless, to provide some degree of objectivity in determining when the plaintiff ought to be expected to consider legal action appropriate. Thus a defendant willing to concede liability and able to satisfy a judgement is postulated so that the defendant's legal manoeuvring or the state of his purse does not enter the equation. If it were otherwise, the defendant's inability to satisfy a judgement would be sufficient to suspend the running of time.

Jurisdictions that have enacted provisions dealing with the hidden cause of action have differed as to the types of actions that should fall within the scope of the provisions. Nova Scotia and England restrict their provisions to personal actions, while Manitoba in 1980 widened its provision to encompass virtually every action.[63] British Columbia restricts the scope of its provision to an action:

(a) for person injuries;

(b) for damage to personal property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought into the Family Compensation Act; or

(h) for breach in trust (other than a fraudulent breach of trust).

The Commission is of the view that the extension provision should apply to the actions that it would subject to a two year limitation period, other than actions for penalties. That would encompass, of course, most personal actions. In addition, actions based on fraud or deceit and actions based upon breach of trust should also be within the scope of the extension provision.

2. ABSENCE FROM THE JURISDICTION

Section 49 of The Limitation of Actions Act provides that "if a person is out of the province at the time a cause of action against him arises, a two year limitation period runs from the time the defendant

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[63] The Limitation of Actions Act, R.S.M. 1970, c. L-150, s. 15(1), as amended S.M. 1980, c. 28.

returns to the province if the action would otherwise be statute-barred". This type of provision was first enacted in 1705[64], to extend the limitation period if the defendant was "beyond the seas".

Such an approach makes little sense in modern practice. Under the rules of the court, a person may now be served ex juris to commence action. Modern transport and communication also make it less likely that absence from the jurisdiction would provide a reasonable excuse for failure to bring an action within the ordinary limitation period.[65] England, New South Wales and British Columbia have rejected absence from the jurisdiction as a reason for postponing the limitation period. The Commission concurrs.

3. DISABILITIES: MINORITY AND MENTAL INCAPACITY

Section 6 of The Limitations Act provides as follows:

> The running of time with respect to a limitation period to bring an action fixed by this or any other Act is postponed for a person who is entitled to bring such an action for so long as he is an infant or:
>
> (a) he is by reason of mental disorder not competent to manage his affairs or estate; and
>
> (b) he or his estate is not represented by a committee appointed under The Public Trustee Act or The Mentally Disordered Persons Act who:
>
> (i) is aware of the cause of action; and
>
> (ii) has the legal capacity to commence the cause of action on behalf of that person or his estate.

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[64] 4 Anne, c. 16, s. 19.

[65] These--and other--arguments against extension of the limitation period are advanced in the Ont. Report, at 95-96.

This provision was adopted in 1983.[66] Prior to the amendment, disability continued in all cases for so long as the infancy or incompetency continued. The amendment was based on the proposition that the disability was only appropriate in the case of a mentally incompetent person if there was no committee responsible for the prospective plaintiff's affairs who was aware of the circumstances. In Alberta, a similar approach has been extended to infants as well, so that an action may be brought against an infant "in the actual custody of a parent or guardian".[67] The Ontario Law Reform Commission has agreed with the Alberta approach.[68]

In the Commission's opinion, some mechanism ought to be available to permit an action to be taken against an infant. However, the Commission is also of the view that an infant's interests will not be sufficiently protected merely because the infant is in the custody of a parent or guardian. The Commission agrees with the British Columbia Law Reform Commission, which was of the opinion that:

> This Commission does not find the approach of the Ontario Law Reform Commission wholly satisfactory....We would be loath to see the way open for a parent to seriously impair the rights of a child because he, for any one of a variety of reasons, might be unwilling to prosecute an action on behalf of that child.[69]

The British Columbia Commission recommended that the running of time should be postponed so long as the disability persists, unless the defendant starts the period running by delivering a "notice to proceed"

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[66] S.S. 1983, c. 80, s. 13.

[67] S.A. 1966, c. 49, s. 3.

[68] Ont. Report, at 96-100.

[69] B.C. Report, at 70.

to the parent or guardian. The Public Trustee would be required to investigate the matter when such a notice is issued. The Commission believes that a similar provision should be included in new Saskatchewan limitations legislation. In addition, extension of the notice to proceed requirement in cases involving mentally incompetent plaintiffs would be desirable; the notice would establish the committee's knowledge of the circumstances giving rise to claim.

It is important that the definition of disability be wide enough to cover any circumstance in which a person has become incapable of managing his own affairs, whether it amounts to a mental disability or not. The Uniform Act adopts this formula: a person should be considered to be under disability if he is "in fact incapable of the management of his affairs because of disease or impairment of his physical or mental conditions".[70] The Commission believes that a similar provisions should be adopted in new Saskatchewan legislation.[71]

4. CONFIRMATION: ACKNOWLEDGEMENT AND PART PAYMENT

The present Limitation of Actions Act contains several provisions dealing with the effect of acknowledgement of liability or part payment of a debt on the running of time. These provisions generally provide

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[70] Uniform Limitations Act, s. 15(1).

[71] In the event that The Dependent Adults Act, introduced as a bill in the 1988 session of the legislature, is enacted, some change in the terminology used in the provisions of limitations legislation will be required. The Dependent Adults Act contemplates the appointment of both personal and property guardians instead of committees. In the Commission's view, only the appointment of a property guardian should be capable of starting the running of a limitation period against a mentally incompetent person. It should also be noted that a "dependent adult" is defined by the Act to include a broader class of persons than those who might be found to be mentally incompetent under The Mentally Disordered Persons Act. It may be satisfactory to corporate that definition in limitations legislation.

that time will start to run a fresh when an acknowledgement or part payment is made.[72] Part payment can be regarded as a special form of unequivocal acknowledgement of liability; in other cases, the law presently requires the acknowledgement to be in writing and signed by the person to be bound by it.

The New South Wales legislation uses the term "confirmation" as a generic term covering both acknowledgement and part payment.[73] The legislation also contains provisions that clearly identify the events that qualify as confirmation. These provisions have been substantially adopted in the British Columbian legislation and in the Uniform Act. Section 17 of the Uniform Act provides inter alia:

> (3) For the Purposes of this section
>
> (a) a person confirms a cause of action only if
>
> (i) he acknowledges a cause of action, right or title of another, or
>
> (ii) he makes a payment in respect of a cause of action, right or title of another;
>
> (b) an acknowledgement of a judgment, debt or obligation has effect
>
> (i) whether or not a promise to comply with the judgment, to pay the debt or to perform the obligation can be implied therefrom, and
>
> (ii) whether or not it is accompanied by a refusal to comply with the judgment, pay the debt or perform the obligation;

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[72] Section 7-9--part payment of debt; s. 12-14 and s. 32-36, 38--part payment for acknowledgement in regard to legacies, title to land, mortgages, agreements for sale and other charges against land; s. 41--part payment and the acknowledgement on a conditional sale of goods.

[73] S.N.S.W. 1969, Act. No. 31, s. 54.

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of a cause of action to recover income due at a particular time operates also as a confirmation of a cause of action to recover income due at a later time on the same amount.

(4) Where a secured party has a cause of action to realize on property subject to a security interest

(a) a payment to him of principal or interest secured by the property; or

(b) any other payment to him in respect of his right to realize on the property or any other performance by another person of the obligation secured;

is, as against the payer or performer, a confirmation of the cause of action.

(5) Where a secured party is in possession of property which is subject to a security interest in his favour

(a) his acceptance of a payment to him of principal or interest secured by the property; or

(b) his acceptance of

(i) payment to him in respect of his right to realize on the property, or

(ii) any other performance by another person of the obligation secured;

is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the property.

The Commission recommends that a similar formulation be adopted.

There are two aspects of the doctrine of confirmation which require further consideration.

Under the present legislation, confirmation extends a limitation

persion only in respect to a few types of action. Claims for unliquidated damages in tort or contract are not subject to confirmation. However, the courts have created what amounts to a confirmation rule in some cases involving unliquidated damages. Where negotiations have reached the point that liability has been accepted by the defendant, leaving only the quantum of damages or compensation to be settled, the defendant will be estopped from pleading a statutory limitation which would impeach that liability.[74] The New South Wales Law Reform Commission recommended that confirmation should stop the running of a limitation period in all cases.[75] The Ontario Law Reform Commission, on the other hand, is of the opinion that the doctrine of confirmation should not be extended, predicting insoluable evidentary problems if the doctrine is substantially extended.[76] British Columbia has accepted this position. The British Columbia Limitation of Actions Act provides that "this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before [the coming into force of the Act]".[77]

The rationale for the doctrine of confirmation arises from the fact that it encourages negotiation and settlement of claims. In the context of acknowledgement for part payment of debt, it has been suggested that:

> Most men would agree that the law upon the limitation of actions should extend the period of limitation when a debtor acknowledges or promises

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[74] See, for example, Phillips v C.N.R. (1914), 6 W.W.R. 1220 (Alta. S.C.) and McLuskie v Sakai, [1985] 6 W.W.R. 258 (B.C.S.C.).

[75] N.S.W. Report, at paras. 250-54.

[76] Ont. Report, at 124-5.

[77] Limitation Act, R.S.B.C. 1979, c. 236, s. 5(10).

> to pay the debt. To give no such effect to acknowledgments would make it impossible for a creditor who did not wish to press the debtor too hard to refrain from suing him.[78]

At one time, this policy may have seemed appropriate only in regard to actions to collect debt and in a few other miscellaneous cases. Today, the realities of the process of negotiation in contract and tort cases makes extension of the doctrine of confirmation to all causes of action attractive. The estoppel rule developed by the courts is essentially a response to that reality. It should be noted that despite the Ontario Law Reform Commission's reservations on the point, the doctrine of estoppel has not created any insurmountable problems of proof in cases involving unliquidated damages. The Saskatchewan Law Reform Commission has concluded that the doctrine of confirmation should extend to all causes of action. But in order to minimize problems of proof in as many cases as possible, the Commission is of the opinion that the formalities presently required in regard to acknowledgement be retained. As a result, the doctrine of estoppel will not be entirely superseded by the new limitations legislation. It will still be available in appropriate cases where formal acknowledgement has not been given. Where negotiations have proceeded to the stage required by the estoppel doctrine, and the state of the negotiations can be documented, problems of proof will be minimal even in the absence of a formal acknowledgement.

At present, a confirmation made after the cause of action that has been statute-barred will have the effect in some cases of reviving the cause of action. A number of Law Reform agencies have recommended that

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[78] J. Brunyate, Limitation of Actions in Equity, London: Stevens, 1932, at 150.

a confirmation should not revive a cause of action. The rationale for the confirmation doctrine does not apply in such cases. The Commission agrees that confirmation should not operate to revive a statute-barred claim.

VI. ASSERTION OF STATUTE-BARRED CLAIMS IN OTHER PROCEEDINGS AND AMENDMENT OF PROCEEDINGS

Limitations can create procedural difficulties even when an action is commenced before the expiration of the period. These problems arise when counterclaims or third party claims are made, and when pleadings are amended after the expiration of the limitation period.

1. SET-OFFS AND COUNTERCLAIMS

Section 11 of The Limitation of Actions Act expressly applies the limitation period contained in the Act to claims "alleged by way of counterclaim or set-off on part of the defendant." This provision has been given different effect in respect to counterclaims than in respect to set-offs. In Reed v Thiel, it was said that:

> It appears that in the case of a set-off the plaintiff must prove that the set-off was barred when the plaintiff commenced the action; the counterclaim, however, is different, and it is enough for the plaintiff to prove that the counterclaim was barred when it was pleaded.[79]

The Commission is of the opinion that the same rule should apply to both set-offs and counterclaims. The present distinction is a trap for the unwary lawyer with no discernable justification.

But what should be the content of the uniform rule? It is generally accepted that a rule that applies a limitation period to a set-off or counterclaim as of the date when it is pleaded is unfair. The English Limitations Act provides some relief for defendants, deeming a set-off or counterclaim to be "a separate action and to have been commenced on the same date as the action on which the set-off or

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[79] [1928] 2 W.W.R. 115 (Sask. C.A.).

counterclaim is pleaded."[80] In the Commission's opinion, however, even this rule is prejudicial to defendants. It agrees with the broader approach taken by British Columbia and the Uniform Law Conference. Set-offs and counterclaims that would otherwise be statute-barred at the time the plaintiffs action is commenced should be permitted if they are related to the plaintiff's action.[81] In this way, all the claims arising out of a transaction will be treated in the same way by limitations legislation.

2. THIRD PARTY PROCEEDINGS

In order to avoid a multiplicity of actions, defendants are entitled to initiate third party proceedings. The third party procedure may be a claim for contribution or indemnity, or may assert of an independant cause of an action against the third party. Under the older limitations statutes, the limitation period applicable to a third party claim was no different than if the claim had been initiated in an independant proceeding against the third party.[82]

Alberta was the first common law province to alter this rule. In 1966, a provision was added to The Limitation of Actions Act providing that:

> When an action to which this Part applies has been commenced, the lapse of time limited by this Part for bringing an action is no bar to
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> (a) proceedings by counterclaim including the

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[80] Limitation Act, 1980, c. 58, s. 35.

[81] Limitations Act, R.S.B.C. 1979, c. 236, s. 4.

[82] The English Limitation Act, 1980, supra, has given legislative expression to this principle. One notable exception is contained in section 143(2) of The Highway Traffic Act, S.S. 1986, c. H-3.1 s. 88(2), which provides that the one year limitations period in respect of motor vehicle accident claims does not apply to counterclaims or third party proceedings.

adding of a new party as a defendant by counterclaim, or

(b) third party proceedings,

with respect to any claims relating to or connected with the subject matter of the action.[83]

A similar provision has been adopted in British Columbia.[84]

The obvious difficulty with provisions of this sort is that the third party loses the limitation defence even though he may have had no notice of his potential liability during the time when the limitation period would ordinarily have run. The Alberta Institute of Law Research and Reform suggested that one solution would be "to require a defendant to file and serve an otherwise statute-barred counterclaim or third party notice within six months of being served with the statement of claim".[85] This proposal does not, however, cure the problem. In many cases, the delay in pursuing the claim occurs before, not after, commencement of the action in which the third party claim is made. For this reason the Commission is of the opinion that the court should have a discretion to disallow an otherwise statute-barred claim by the defendant against a third party if that third party has suffered actual prejudice, but permit the claim in all other cases in which it is connected with the subject matter of the main action.

3. AMENDMENT OF PLEADINGS

At common law, the courts took a restrictive attitude toward amendment of pleadings after the expiration of a limitation period. In

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[83] See now R.S.A., c. L-15, s. 60(1).

[84] Limitation Act, R.S.B.C. 1974, c. 236, s.4.

[85] The Alberta Working Paper, at 67.

Saskatchewan, this rule was altered by statute in 1940.[86] The court was given an unfettered discretion to permit amendment of pleadings after a limitation period had expired, provided that the amendment did not involve a change of parties. The common law rule continued to apply where there was a change of parties, but was later relaxed by the courts.[87] In 1983, section 44, rule 11 of The Queen's Bench Act was amended to provide that:

> Notwithstanding that a limitation period has expired since the commencement of an action, the court may allow an amendment to the pleadings:
>
> (a) asserting a new claim; or
>
> (b) adding or substituting parties;
>
> provided that the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment...

This does two things. First, it gives statutory expression to the rule developed by the courts in cases in which parties were added or substituted by amendment of the pleadings. Second, the provision replaces the unfettered discretion formally given the courts to allow amendment in other cases.

The Commission is of the opinion that this provision works well. It is a similar, though not identical, to a provision adopted by the Uniform Law Conference.[88] The Commission sees no reason, however, to alter the present Saskatchewan law. Nevertheless, it would be desirable

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[86] See now The Queen's Bench Act, R.S.S. 1978, C. Q-1, s. 27 (Rule 11).

[87] See, for example, Walbaum v G & R Trucking (1983), 144 D.L.R. (3rd) 636 (Sask. C.A.).

[88] The Uniform Limitations Act, s. 20.

to repeal The Queen's Bench Act provision, and insert an identical provision in new limitations legislation.

VII. MISCELLANEOUS PROBLEMS

1. THE ULTIMATE LIMITATION PERIOD

The Commission has proposed an expanded set of events that will delay the running of time. Limitation periods should not, however, be delayed indefinitely. The New South Wales Commission recommended that after the passage of 30 years an action should be statute-barred notwithstanding any fraud, disability, lack of knowledge or confirmation of the cause of action.[89] This approach was accepted by the British Columbia Commission.[90] This Commission agrees. An ultimate limitation period of 30 years should be imposed beyond which no action (other than those not subject to limitation periods) may be brought.

2. EXTINGUISHMENT OF RIGHT

It is conventional wisdom that the statute of limitations operates only to bar the remedy but does not extinguish the right. This severing of rights and remedies has been criticised. Falconbridge, for example, wrote that:

> It may also be observed generally that "right" and "remedy" are ambiguous and misleading terms. A "right" is not something that has an objective existence independent of a "remedy"....[91]

Nevertheless, in certain isolated instances the courts have found that the right/remedy dichotomy is relevant. The Ontario Law Reform Commission was able to identify ten situations where the existence of

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[89] N.S.E. Report, at para. 241.

[90] B.C. Report, at 101.

[91] J.D. Falconbridge, "The Disorder of the Statutes of Limitation" (1943), 21 Can. Bar Rev. 669.

a right after the barring of a remedy was significant.

The Commission is of the opinion that the right/remedy dichotomy should be abandoned in all cases. Instead, an issue-oriented approach should be adopted to determine what, if anything, survives the running of a limitation period. This report has already addressed the question of the effect of a fresh conversion starting the statute running anew against a second converter, and the effect of a confirmation in respect of a statute-barred action. The problems that can arise in respect of conflict of laws rules in this regard will be dealt with later in this report. In other cases, the Commission agrees with the New South Wales Commission, which concluded that:

> We think it is a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely as an occasional embarrassment to the student, the lawyer and the citizen.[92]

It is sometimes suggested that the requirement that a limitation period be specifically pleaded is a consequence of the right/remedy distinction. In fact, it is likely that the requirement that a limitation period be pleaded orginated out of the old, complex law of pleading. Nevertheless, in 1878 Lord Cairns in Dawkins v Lord Penryhn adopted the right/remedy distinction as the basis for determining whether limitation periods should be specifically pleaded. In nineteenth century law, the limitation period applying to actions against adverse possessors was somewhat anomolous, since the relevant limitation statute provided for extinguishment of title as well as barring an action. Lord Cairns held that in such a case, it was

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[92] N.S.W. Report, at 323.

unnecessary to plead the limitation period.

In the Commission's view, the question of whether or not a limitation period should be specifically pleaded should not hinge upon the right/remedy dichotomy. It is appropriate to require that all limitations defences be specifically pleaded because of the potential for surprise. Moreover, there may be rare cases in which a defendant is content to let the merits of a dispute go to the court without raising a limitation defence. Rule 142 of the Rules of the Court of Queen's Bench, adopted in 1982, requires a party to plead "any statute or regulation on which his action or defence is founded". Thus, as a matter of practice, all limitation periods must be pleaded in Saskatchewan. Whether the limitation is characterized as substantive or procedural is irrelevant.

3. CONFLICT OF LAWS

Under conflict of laws rules, the court of the jurisdiction where the action is brought will apply its own procedural law to actions brought before it, but apply the substantive law of the jurisdiction out of which the cause of action arose. If the limitation statute extinguishes the right, it is considered to be substantive; but if it bars the remedy, it is considered procedural. This is another example of application of the right/remedy dichotomy that has been criticised as unrealistic.

The Uniform Law Conference proposed that the limitations law of a province should be applied to all actions in the province to the exclusion of the law of limitations of all other jurisdictions.[93] The

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[93] The Uniform Limitations Act, s. 21.

Newfoundland Law Reform Commission, however, favours a different approach: where it is determined that the law of another jurisdiction is applicable and the limitation law of that jurisdiction is, for purposes of private international law, classified a procedural, the court may apply the limitation law of the province or may apply the limitation law of another jurisdiction if a more just result is produced.[94] It will be noted that, unlike the Uniform Act, the limitations legislation recommended by the Newfoundland report would extinguish the right as well as the remedy. Thus, this limitation law would be classified as substantive and would be applied by a foreign court under the Newfoundland proposal. This approach has the advantage of treating foreign limitations law that is classed as substantive in a like manner. This Commission is pursuaded by the reasoning of the Newfoundland Commission.

4. TRANSITION

The transition between the present limitations law and the proposed Act should not present a problem. The Commission proposes that the new legislation apply to all causes of action that accrue after the coming into force of the legislation. The legislation should also expressly provide that it does not operate so as to revive a statute barred-action.

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[94] Newfoundland Report, at 330-38.

VIII. SPECIAL LIMITATION PERIODS

1. GENERAL

Perhaps the single greatest problem plaguing Saskatchewan limitations law is the proliferation of special limitation periods. Numerous special limitation provisions are scattered throughout the statutes of Saskatchewan.[95] These provisions oust the general limitations law set out in The Limitation of Actions Act and substitute their own special rules.

This state of affairs is unacceptable for three reasons. First, the special limitation periods are invariably shorter than those provided by The Limitation of Actions Act. Typically, a limitation period of one year or less is created. Second, the special limitation provisions usually contain only a bare limitation period. The rules of the general limitations law that provide for postponement or suspension of a limitation will not generally apply.[96] This, combined with the shortened period of time provided by many of the special limitation periods has all to often led to injustice: the problem of the hidden cause of action is exacerbated because of the much reduced period within which the injury must manifest itself.

The third reason is that special limitation rules appear to be enacted on an ad hoc basis. The unique rules that govern each special period differ. Some special limitation provisions require notice to be

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[95] See J.P. Denis Pelletier, "Limitations in Saskatchewan Statutes" (1980-81), 45 Sask. L. Rev. 101; and "Limitations in Saskatchewan Statutes" (1983-84), 48 Sask. L. Rev. 325 for a list of special limitation periods.

[96] An exeption to this is section 6 of The Limitation of Actions Act, which provides that the suspension of the limitation period in cases of disability should apply to all limitation periods "in this Act or any other Act".

given before an action is commenced; a few permit the court to extend an expired limitation period. In some the running of time commences when the conduct complained of occurs; in others time begins to run when the defendant's services are terminated. That there are so many periods creates a hidden trap for the unwary lawyer. The variation in wording amoung the various special limitation periods invites litigation on trivial distinctions, and hinders the development of principles applicable to general limitations law.

Special limitation provisions are arbitrary, unreasoned and inflexible. Why do the rules differ so greatly? Why, for example, should the running of time commence on the occurrence of the injury in the case of a registered nurse, and yet commence when services are terminated in the case of a psychiatric nurse? Why is the limitation period for actions against chiropractors only six months? Why do registered social workers deserve a one year limitation period when other social workers are not entitled to this special protection? Special limitations provisions appear to throw a "protective cloak" around many of the professions. This perception is extremely damaging, as it suggests a conspiracy between lawmakers and powerful lobby groups at the expense of the public.

The Commission proposes that special limitation periods be rationalized. All actions that are not genuinely unique should attract the same limitation rules, and so far as possible these rules should be brought within the general limitation of actions statute.

It should be noted, however, that this report deals only with "true" limitation of actions. Accordingly, the following classes of time limitations have been excluded:

(1) time limits for the bringing of appeals;

(2) time limits on proceedings to quash municipal bylaws;

(3) time limits for challenging elections;

(4) time limits on the prosecution of provincial offences;

(5) time limited claims - i.e., claims that must be made or objections that must be taken to a body other than a court, such as a taxing authority, a Minister, or an administrative tribunal.

The remaining "true" limitation provisions can then be broken down into the following categories:

(1) limitation periods that afford special protection to professional organizations;

(2) limitation periods that afford special protection to other public or quasi-public organizations and bodies corporate;

(3) limitation periods that govern particular classes of common law actions;

(4) limitation periods that govern actions or remedies created by statute;

(5) notice provisions.

2. PROFESSIONAL ORGANIZATIONS

A substantial number of professional groups receive the protection of special limitation periods, usually of one year. To a certain extent, the development of such speical provisions was justified within the context of traditional limitations law. An action against a professional can often be founded upon contract as well as tort. In the absence of a special period, the plaintiff could take advantage of a six year limitation period rather than the usual two year period, even though the essence of the action was the neglignece of the defendant.

The Commission is of the opinion that a six year period is too long, but it is also of the view that a one year period is inappropriate. Periods of one year or less place too onerous a burden

on plaintiffs. In many cases it is not unreasonable to expect that it will take the plaintiff a full year to recover from the effects of the injury so as to be able to fully evaluate his situation, seek legal advice and then direct that proceedings be instituted if a settlement cannot be reached.

Furthermore, very few of the special limitation provisions provide for the hidden cause of action. This is of particular concern where professional groups are involved, as the facts are often within their realm of knowledge. The limitation period will often have expired before the injury is discovered. The Commission is of the opinion that it is unfair to allocate the risk in this fashion.

The Commission is of the view that the general two year period that it has proposed for most personal actions is appropriate, and that the proposals governing hidden causes of action should apply. Accordingly, the Commission proposes that all special limitation periods applying to professional groups be repealed.[97]

3. OTHER PUBLIC AND QUASI-PUBLIC ORGANIZATIONS

In addition to professional groups, the protection of special limitation periods is afforded to bodies such as school boards, provincial railways, hospitals and municipalities. These bodies are often public authorities or large institutions of a private nature that play a crucial role in the community. But does this special position justify the use of special limitation provision? The New South Wales Law Reform Commission analyzed four principal grounds upon which such

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[97] The specific provisions that should be repealed are set out in Recommendation 2(1).

special treatment might be supported.[98]

First, it is argued that authorities will have difficulty preparing their budgets if special limitation provisions are repealed. The authority will have a greater volume of litigation and greater exposure to liability, which will jeopordize advance financial planning.

The New South Wales Commission rejected this contention, stating that:

> Limitation periods of twelve months or less have been shown in England, in some Australian States, and elsewhere, to be a hardship on plaintiffs. We think it unfair that such parties should be disadvantaged merely in aid of the budgeting of large instrumentalities of the state that have public revenue resources to support them should any unexpectedly large liability in damages consume their annual allocation of funds.[99]

Furthermore, the authority has access to public risk insurance, and can use its past experience in making a forecast for the future.

Second, it is argued that public authorities would be severely handicapped by having to retain records for longer periods. The New South Wales Commission found this unconvincing. It pointed out that there are many large commercial organizations which have activities as multifarious and diverse as public authorities, but which do not enjoy a special privilege.

It is also argued that large public authorities have a substantial turnover of staff and that therefor there is a greater risk that testimony will be lost. But here again the authority is subject to the same constraints faced by other large organizations.

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[98] Third Report on the Limitation of Actions - Special Protections (1975), L.R.C. 21, at 28-31.

[99] Ibid., at 28.

Finally, it is argued that public authorities, unlike other organizations, are not free to choose their activities. The view of the New South Wales Commission was that the use of unreasonably short limitation periods for that reason merely forces injured plaintiffs to subsidize government activity.

The Law Reform Commission of Saskatchewan recognizes that an unreasonable burden would be placed on public authorites if it could not gauge it potential liability. But a limitation period of one year or less is unreasonably short and unfairly operates against the injured victim. The two year period that would operate in the vast majority of disputes between plaintiffs and public authorities strikes a fair balance.

Public authorities often have protections other than limitation periods. Statutes, such as The Public Officers Protections Act, for example, confer protection on persons acting in pursuance of a statute. The Commission is of the view that the mere fact that an act is authorized by statute provides no compelling reason for departing from the normal limitation rules.

It should be noted that some of the limitation periods set out in The Northern Municipalities Act, The Rural Municipalities Act, and The Urban Municipalities Act are not in respect of common law actions. For example, no action could be maintained at common law by a member of the public in respect of an injury sustained because a highway is out of repair.[100] The statutes, however, create a statutory duty of repair and attach to it a particularly short limitation period of three months. Nevertheless, these actions are sufficiently close to negligence actions

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[100] See Muirhead v Nesbitt (1985), 15 D.L.R. (4th) 604 (Ont. C.A.)

to warrant similar treatment. This view is fortified once it is observed that these statutes presently apply a three month limitation period to all actions for damages, including those based on common law.

If it is thought abolition of special limitation periods will expose municipalities to unacceptable levels of liability, the solution must be to change the law respecting municipal liability so as to separate those claims that should succeed from those that should not. Unreasonably short periods of limitation should not be used as a substitute. Accordingly, special limitation periods applying to actions against public and quasi-public corporations should be repealed.[101]

The Crown is given preferential treatment in respect of actions for the return of overpaid taxes. The Commission is of the opinion that the Crown should be subject to the same six year limitation period that governs mistaken payments. Such special limitation periods should also be repealed.[102]

4. OTHER CAUSES OF ACTION

The discussion to this point has dealt with limitation periods governing actions against particular persons or bodies. Other special limitation periods govern particular actions to which the general limitation law would otherwise apply. The most significant are those that deal with automobile accidents.

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[101] The specific provisions on this category are set out in Recommendation 2(2).

[102] The specific provisions in this category are set out in Recommendation 2(3).

Section 88 of The Highway Traffic Act[103] provides that no action may be brought for recovery of damages occasioned by a motor vehicle after 12 months from the time the damages were sustained. A similar limitation exists in respect of snowmobiles.[104]

Again, one must inquire whether there are any special circumstances that would justify a departure from the proposed two year limitation period that would otherwise apply. The British Columbia Law Reform Commission considered this question, and concluded that a one year period is inappropriate.[105] Often a claimant's injuries are not capable of being determined within one year, but require further assessment before a settlement can be reached. In many cases, the claimant is forced into a lawyer's office, and sometimes into litigation, when there is really no dispute and the claimant would prefer to settle the matter himself. Large insurance companies might argue that the one year period is necessary for their budgeting and management of their "inventory" of claims. These sorts of arguments have been rejected in respect of public authorities and other instrumentalities. Similar considerations apply to insurance companies. Injured plaintiffs should not be expected to subsidize insurance companies through the use of unreasonalby short limitation periods. Accordingly, it is proposed that the limitation periods in The Snowmobile Act and The Highway Traffic Act be repealed.

A number of provisions in The Saskatchewan Insurance Act and The Automobile Accident Insurance Act limit the time within which the

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[103] R.S.S. 1978, c. H-3.1, (S.S. 1986, c. H-3.1).

[104] R.S.S. 1978, c. S-52, s. 33.

[105] B.C. Report, at 108-110.

insured may bring an action against an insurer.[106] In most cases the period is one year. The obligation to pay money under a contract would normally attract a six year limitation period under the present Act. The Commission has, however, proposed that a two year limitation period should be applied to most types of actions for breach of contract. The Commission therefore proposes that this two year limitation period should govern such claims.

There are a number of actions that are created by statute, but which are similar to common law actions. For convenience it is proposed that such limitation periods be moved to the general limitation statute. The Commission proposes that the limitation periods in the following statutes be located in the proposed Limitation of Actions Act:

1. The Fatal Accidents Act, c. F-11, s. 6 (one year after death).

2. The Privacy Act, c. P-24, s. 9 (two year after violation).

Finally, section 14 of The Libel and Slander Act[107] provides that an action for libel contained in a newspaper shall be commenced within six months after the publication came to the notice of the person defamed. The Commission is of the view that newspapers should not be afforded a special limitation period, but should be governed by the same two year period applicable to defamation actions generally.[108] It is therefore proposed that section 14 of The Libel and Slander Act be repealed.

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[106] See J.P. Denis Pelletier, "Limitations in Saskatchewan Statutes", supra, note 208 for a summary of these provisions.

[107] R.S.S. 1978, c. L-14.

[108] Both Alberta and Manitoba have repealed this six month period.

5. ACTIONS OR REMEDIES CREATED BY STATUTE

Many statutes create rights or remedies that do not exist at common law and affix limitation periods to them.[109] These special limitation periods usually do not create serious problems. They were not created to give privileged classes of defendants special treatment, but because they relate to subject matter not contemplated in the general Limitation of Actions Act.

When an Act creates rights that do not exist at common law, one should expect to find any qualification or restriction of that right, including any time limitation, in that particular statute. These limitation periods are usually very specific and it would likely be difficult to understand their import if they were isolated from the other provisions of the statute. Accordingly, it is not proposed that these limitation periods be removed to the general limitations statute.

6. NOTICE PROVISIONS

There are two types of notice provisions. The first requires the giving of notice before an action is brought. An example of this is subsection 33(1) of The Public Trustee Act,[110] which provides that no action shall be brought against a person in respect of whom a certificate of incompetence has been granted unless 30 days' notice is given to the Public Trustee. Such provisions are innocuous, though probably unnecessary in most cases: it would likely be sufficient simply to require notification of the Public Trustee in this example, without affixing a time period. But such notice requirements are not

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[109] The specific provisions in this category are set out in Recommendation 3.

[110] R.S.S. 1978, c. P-43.1.

limitation periods or analogous to them, though they do have the effect of shortening the limitation period by the length of the notice period stipulated. The Commission does not recommend the deletion of such notice provisions.

The second type of notice provision is one that prohibits the bringing of any action unless notice is given within a certain time after the cause of action arises. Often the time limit is very short. For example, under The Highways and Transportation Act[111] notice of an action for damages caused by the disrepair of a highway must be given within thirty days of the accident. In some cases there is a discretion in the court to disregard a failure to give notice where there was a reasonable excuse for the failure and the defendant was not prejudiced, but no general policy in this regard has been established.[112] The purpose of provisions such as these is to permit the defendant to investigate the accident or occurrence and collect evidence as soon as possible. Nevertheless, they are in substance special limitation periods. Because they are usually so short, they are a potential source of real problems.

The Ontario Law Reform Commission stated that it "does not believe that a person should be absolutely barred from bringing an action merely because he has failed to give the notice required".[113] It proposed that all notice provisions contain a proviso that the court may waive the notice. The Law Reform Commission of British Columbia went further and

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111 R.S.S. 1978, c. H-3.

112 See for example The Rural Municipality Act, R.S.S. 1978, c. R-26, s. 376(2).

113 Ont. Report, at 84.

proposed that such notice provisions be abolished altogether.[114] The Commission prefers the approach of the British Columbia Commission.

These special notice provisions are generally known only to lawyers. It is not reasonable to expect that a person involved in an accident will have sought legal advice within a week or a month of an accident. Even under the Ontario proposal, many claimants will be forced to go before a court and attempt to overcome the heavy onus of establishing that the failure to notify was justified and that the defendant was not prejudiced.

In addition, one may well question whether there is anything truly unique about the evidentiary problems in such actions. In the case of action relating to the disrepair of a road, it seems that there will be a smaller likelihood of lost evidence that in many other tort actions. Throughout this report the Commission has embraced the idea that the law of limitations should not give preferential treatment to certain groups of defendants at the expense of their victims. Accordingly, it proposes that notice provisions that function as limitation periods be repealed.[115]

7. INSURING ACCESSABILITY OF LIMITATIONS LAW

Although the approach to special limitation period outlined above will substantially reduce the number of special periods and rationalize those that remain, it will not entirely eliminate the problems they create. The list of special periods may be increased again in the future as new statutes are adopted, and most of the special periods will

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[114] B.C. Report, at 116.

[115] Provisions in this category are listed in Recommendation 4.

continue to be scattered through the statute books, ready to take the unwary by surprise.

Ideally, a single limitations statute should contain all the limitation periods in force in the province. As noted above, however, some of the special periods are so bound up with the technical language of the Acts of which they are part as to make this approach impractical.

There is, however, another alternative that was suggested by several members of the bar who commented on the Commission's Tentative Proposals. All special limitations periods should be identified by statute and section in a schedule to the new Limitations Act. No limitation should be effective unless it is referred to in the schedule. This would encourage rationalization of new special periods with the policy of the Act and make it possible to quickly identfy limitation periods applicable in specific cases.

IX. RECOMMENDATIONS

1. THE PROPOSED ACT

SHORT TITLE AND INTERPRETATION

Short Title 1. This Act may be cited as The Limitations Act.

Interpretation 2. In this Act:

"action" (a) "action" includes any proceeding in a court and any exercise of a self-help remedy;

"judgment" (b) "judgment" means a judgment or order ofa court, or an award pursuant to an arbitration to which The Arbitration Act applies;

"security interest" (c) "security interest" means an interest in property that secures payment or performance of an obligation but does not include the interest of a vendor who retains title to land as security for the purchase price;

"trust" (d) "trust" includes express, implied, resulting and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a security interest in property.

RULES OF EQUITY

No interference with certain rules of 3.-(1) Nothing in this Act:

(a) interferes with a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;

(b) interferes with a rule of equity that refuses relief, on the grounds of laches, to a person claiming equitable relief,

whose right to bring an action is not barred by this Act.

Limitation periods in other statutes

(2) Where a limitation period is contained in any other statute, the provisions of this Act apply to it as though it were a limitation period contained in this Act

LIMITATION PERIODS

Actions subject to a two year limitation period

4. The following actions shall not be brought after the expiration of two years after the date on which the right to do so arose:

(a) an action in contract other than an action specifically mentioned in section 5, 6 or 7;

(b) an action in tort other than an action specifically mentioned in section 5, 6 or 7;

(c) an action under The Fatal Accidents Act;

(d) an action in tort under The Privacy Act;

(e) a civil action by the Crown or any other person to recover a fine or other penalty imposed under any Act.

Actions subject to a ten year limitation period

5. The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose:

(a) an action against the personal representative for a share of the estate;

(b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was privy;

(c) an action against a trustee for the conversion of trust property to the trustee's own use;

(d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) an action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor.

Actions not subject to a limitation

6.-(1) The following actions are not governed by any limitation period and may be brought at any time:

period

(a) an action by a debtor in possession of property subject to a security interest to redeem the property;

(b) an action by a secured party in possession of property subject to a security interest to realize on the property;

(c) an action for possession of land by a life tenant or remainder man;

(d) an action relating to the enforcement of an injunction or a restraining order;

(e) an action to enforce an easement, restrictive covenant, or profit-a-prendre;

(f) an action for a declaration as to personal status;

(g) an action for or declaration as to the title to property by any person in possession of that property;

(h) an action for possession of land where an owner has been dispossessed under circumstances amounting to trespass;

(i) an action by a purchaser to obtain title to land under an agreement for sale;

(j) an action by a vendor for cancellation under an agreement for sale of land; and

(k) an action on a judgment for the possession of land.

(2) In an action by a purchaser to obtain title to land under an agreement for sale, the amount required to be paid by the purchaser to the vendor shall not include interest accruing after the expiration of six years after the last payment under the agreement for sale became due.

Actions subject to a six year period

7.-(1) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

(2) Without limiting the generality of subsection (1), the following actions shall not be brought after the expiration of six years after the date on which the right to do so arose:

(a) an action to recover a debt whether secured or not;

(b) an action for restitution or unjust enrichment, other than an action based on a constructive trust;

(c) an action by a secured party not in possession of property subject to a security interest to realize on the property;

(d) an action by a debtor not in possession of property subject to a security interest to redeem the property;

(e) an action for damages for conversion or detention of goods or chattels;

(f) an action to recover goods or chattels wrongfully taken or detained;

(g) an action by a tenant against his landlord for possession of land; and

(h) an action on a foreign judgment.

(3) Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him:

(a) a further cause of action for the conversion or detention of the goods;

(b) a new cause of action for damage to the goods; or

(c) a new cause of action to recover the proceeds of a sale of the goods;

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of six years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

CONFIRMATION, POSTPONEMENT AND SUSPENSION OF LIMITATION PERIODS

Confirmation 8.-(1) Where, after time has commenced to run but before the limitation period has expired, a person against whom an action lies confirms the cause of action,

the time during which the limitation runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section:

(a) a person confirms a cause of action only if he:

(i) acknowledges a cause of action, right, or title of another; or

(ii) makes a payment in respect of a cause of action, right, or title of another;

(b) an acknowledgment of a judgment or debt has effect:

(i) whether or not a promise to pay can be implied from it; and

(ii) whether or not it is accompanied by a refusal to pay;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money;

(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.

(3) Where a secured party has a cause of action to realize on property subject to a security interest:

(a) a payment to him of principal or interest secured by the property;

(b) any other payment to him in respect of his right to realize on the property or any other performance by any other person of the obligation secured;

is a confirmation by the payer or performer of the cause of action.

(4) Where a secured party is in possession of property subject to a security interest:

(a) a payment to him of principal or interest

secured by the property; or

(b) any other payment to him in respect of his right to realize on the property or any other performance by another person of the obligation secured;is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.

(5) For the purposes of this section, an acknowledgment of a cause of action is not binding unless it is in writing and signed by the person giving the acknowledgment.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him, or to a person through whom he claims, or if the confirmation is made in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(7) For the purposes of this section, a person is not bound by a confirmation unless:

(a) he is a maker of the confirmation;

(b) after the making of the confirmation the person becomes, in relation to the cause of action, a successor of the maker;

(c) the maker is a trustee at the date of confirmation, and the person at that date or thereafter becomes a trustee of the trust to which the maker is a trustee; or

(d) the person is bound under subsection (8).

(8) Where a person who confirms a cause of action:

(a) to recover property;

(b) to enforce an equitable estate or interest in property;

(c) to realize on property subject to a security interest;

(d) to redeem property subject to a security interest;

(e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or income or profits of such property or by way of sale, lease, or

other disposition of such property or by way of other remedy affecting such property; or

(f) to recover trust property into which trust property can be traced;

is on the date of confirmation in possession of the property, the confirmation binds any other person in possession during the continuance of the limitation period unless that other person was in possession of the property on the date of the confirmation or claims through a person, other than the maker of the confirmation, who was in possession of the property on the date of the confirmation.

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

Postponement where trust

9. The running of time with respect to the limitation period fixed by this Act for an action:

(a) based on fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use;

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

Postponement of limitation period

10.-(1) The running of time with respect to the limitation period fixed by this Act for an action to which this section applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know:

(a) the identity of the defendant;

(b) the facts upon which his action is founded; and

(c) that the injury suffered was significant.

(2) Subsection (1) applies only to:

(a) actions subject to a two year limitation period other than an action to recover a penalty;

(b) actions based on fraud or deceit;

(c) actions in which material facts relating to the cause of action have been wilfully concealed;

(d) actions for breach of trust not within section 9.

(3) For the purposes of subsection (1), an injury is significant if a person would reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(4) This section (1) does not operate to the detriment of a bona fide purchaser for value.

Persons under disability

11.-(1) For the purpose of this section, a person is under a disability:

(a) while he is a minor;

(b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition and he or his estate is not represented by a committee or other person appointed under The Public Trustee Act or The Mentally Disordered Persons Act who has the legal capacity to commence the course of action on behalf of that person or his estate.

(2) Where a person is under a disability at the time his right to action arises, the beginning of the limitation period is postponed so long as that person is under a disability.

(3) Where a person who has a cause of action comes under a disability after the limitation period for the action has begun to run but before the expiration of it, the running of the limitation period for the action is suspended until he is no longer under a disability.

(4) Notwithstanding subsections (2) and (3), where a person under a disability has a cause of action against another person, that other person may cause a notice to proceed with the action to be delivered in accordance with this section, and the limitation period begins to run against the person under the disability as if he had ceased to be under the disability on the date on which the notice to proceed was delivered.

(5) A notice to proceed mentioned in subsection (4)

shall:

(a) be in writing:

(b) be addressed or delivered:

(i) in the case of a minor, to his parent or guardian, as the case may be, and to the Public Trustee, and

(ii) in the case of a person incapable of the management of his affairs because of disease or impairment of his physical or mental condition, to the committee or other person appointed under The Mentally Disordered Persons Act, and to the Public Trustee;

(c) state the name of the person under the disability;

(d) specify the circumstances out of which the cause of action may arise with such particularity as is necessary to enable a determination to be made as to whether the person under the disablity has or may have a cause of action;

(e) give warning that the cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;

(f) state the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person delivering the notice or his solicitor.

(6) Where there is no parent, guardian, committee or other person to whom notice can be given under subsection (5), the Court of Queen's Bench may appoint a guardian ad litem; and the notice referred to in subsection (5) may thereafter be given to the guardian ad litem and to the Public Trustee.

(7) Subsection (4) does not apply to a person under a disability in bringing an action against his parent or guardian, the committee or other person appointed for him, or the Public Trustee.

(8) The delivery of a notice to proceed under this section operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(9) The onus of proving that the beginning of a limitation period for an action has been postponed or suspended under this section rests on the person claiming the benefit of the postponement or suspension.

(10) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(11) Where a notice to proceed under this section is delivered to the Public Trustee and it appears to him that the other person to whom the notice was delivered has failed to take reasonable steps to protect the interests of the person under the disability, the Public Trustee shall:

(a) investigate the circumstances specified in the notice; and

(b) if he believes that an action for the benefit of the person under the disability would have a reasonable prospect of succeeding and would result in a judgment that would justify the bringing of the action, commence and maintain such an action.

(12) The Lieutenant Governor in Council may make regulations prescribing the form, content and method of delivery of and other matters relating to notices to proceed to be delivered under this section.

Ultimate limitation period

12.-(1) Subject to section 6, but notwithstanding a confirmation made under section 8 or a postponement or suspension of the running of time under section 9, 10 or 12, no action to which this Act applies shall be brought after the expiration of thirty years from the date on which the right to do so arose.

(2) Subject to subsection (1), the effect of sections 9, 10, and 11 is cumulative.

EXTINGUISHMENT OF RIGHT

Extinguishment of cause of action and title

13.-(1) When a limitation period expires and the right to bring an action is thereby barred, the cause of action upon which the action was based and any title involved are extinguished.

ASSERTION OF STATUTE BARRED CLAIMS IN OTHER ACTIONS AND AMENDMENT OF PROCEEDINGS

Assertion of statute barred claims in other proceedings

14.-(1) Where an action has been brought, the expiry of the limitation period for bringing an action or a claim does not bar the making of that claim in the action originally brought:

(a) by way of counterclaim, including the addition of a new party as a defendant by counterclaim;

(b) by way of third party proceedings; or

(c) by way of set off;under any applicable law if the claim is related to or connected with the action originally brought, and the action originally brought is not barred by the expiry of a limitation period.

(2) A court may disallow third party proceedings permitted under subsection (1) if it is satisfied that the third party will suffer actual prejudice.

Amendment of pleadings

15.-(1) Notwithstanding that a limitation period has expired since the commencement of an action, the court may allow an amendment of the pleadings:

(a) asserting a new claim; or

(b) adding or substituting parties;

if the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment.

GENERAL

Conflict of laws

16. Where it is determined in an action that the law of a jurisdiction other than Saskatchewan is applicable and the limitation law of that jurisdiction is, for the purposes of private international law classified as procedural, the court may apply Saskatchewan limitations law or may apply the limitations law of the other jurisdiction if a more just result is produced.

Crown bound

17. The Crown is bound by this Act.

Transition

18.-(1) Subject to subsection (2), this Act applies to all actions that arise after the coming into force of this Act.

(2) Nothing in this Act revives a cause of action that is barred at the coming into force of this Act.

2. SPECIAL LIMITATION PERIODS TO BE REPEALED

The Commission recommends abolition of the following special limitation periods:

(1) Relating to professional groups:

1. The Accredited Public Accountants Act, c. A-4, s. 34.
2. The Certified General Accountants Act, c. C-4.1, s. 35.
3. The Chiropractic Act, c. C-10, s. 18.
4. The Dental Profession Act, 1978 c. D-5.1, s. 57.
5. The Denturist Act, c. D-7, s. 30.
6. The Medical Profession Act, 1981, c. M-10.1, s. 72.
7. The Medical Radiation Technologists Act, c. M-10.2, s. 25.
8. The Naturopathy Act, c. N-4, s. 15.
9. The Opthalmic Dispenser Act, c. O-5, s. 29.
10. The Optometry Act, 1985, R.S.S. 1984-86, c. O-6.1, s. 50.
11. The Osteopathic Practice Act, c. O-7, s. 29.
12. The Physical Therapists Act, 1984, c. P-11.1, s. 30.
13. The Psychiatric Nurses Act, c. P-36, s. 21.
14. The Registered Psychologists Act, c. R-14, s.11.
15. The Registered Nurses Act, 1978, c. R-12.1, s. 31.
16. The Registered Occupational Therapists Act, c. R.-13, s. 22.
17. The Registered Social Workers Act, c. R-15, s. 19.
18. The Saskatchewan Embalmers Act, c. S-15, s. 44.
19. The Veterinarian Act, c. V-5, s. 18.
20. The X-Ray Technicians Act, c. X-1, s. 12.

(2) Relating to public and quasi-public bodies:

1. The Education Act, c. E-0.1, s. 95.

2. The Highways and Transportation Act, c. H-3, s. 85(3).

3. The Mental Health Services Act, c. M-13.1, s. 40.

4. The Hospital Standards Act, c. H-10, s. 15.

5. The Northern Municipalities Act, c. N-5.1, ss. 113(6)(a), 267(1), 269(4) & (5) (S.S. 1983, c. N-5.1).

6. The Public Libraries Act, c. P-39, s. 84(1).

7. The Public Officers Protection Act, c. P-40.

8. The Rural Municipality Act, c. R-26, ss. 376(1), 378.

9. The Saskatchewan Railways Act, c. S-33, s. 19(1).

10. The Urban Municipality Act, 1984, c. U-11, ss. 314(1) & (2), 319(1), 321(4).

(3) Relating to actions for return of overpaid taxes:

1. The Community Cablecasters Act, c. C-17, s. 30(2).

2. The Corporation Capital Tax Act, c. C-38.1, s. 38(2).

3. The Education and Health Tax Act, c. E-3, s. 18(2).

4. The Fuel Tax Act, c. F-23.1, s. 15(4).

5. The Tax Enforcement Act, c. T-2, s. 35.

(4) Other:

1. The Libel and Slander Act, R.S.S. 1978, c. L-14, s. 14.

2. The Snowmobile Act, c. S-52, s. 33.

3. The Highway Traffic Act, c. H-3.1, s. 88.

4. The Fatal Accidents Act, c. F-11, s. 6.*

5. The Privacy Act, c. P-24, s. 9.*

* These limitation periods are re-enacted in the proposed Limitation of Actions Act.

3. SPECIAL LIMITATION PERIODS TO BE RETAINED

The Commission recommends that the following special limitation periods be listed in a schedule to the proposed Limitation of Actions Act:

SCHEDULE

Limitation periods in force in Saskatchewan, but not contained in this Act.

(i) Time limits on the setting aside of transactions or proceedings

The Arbitration Act, c. A-24, s. 30(1).

The Bulk Sales Act, c. B-9, ss. 19, 39.

The Forest Act, c. F-19, s. 31(2).

The Fraudulent Preferences Act, c. F-21, s. 5.

The Labour Standards Act, c. L-1, s. 79(1).

The Matrimonial Property Act, c. M-6.1, s. 30(2).

The Real Estate Brokers Act, c. R-2, s. 50(3).

The Reciprocal Enforcement of Maintenance Orders Act, 1983, R-4.1, ss. 3(5).

The Small Claims Enforcement Act, c. S-51, s. 32.

The Unconscionalbe Transactions Relief Act, c. U-1, s. 8.

(ii) Actions against special funds

The Land Titles Act, c. L-5, c. 204(1).

The Personal Property Security Act, c. P-6.1, s. 53(2).

(iii) Actions for maintenance

The Children of Unmarried Parents Act, c. C-8, s. 9.

The Dependants' Relief Act, c. D-25, s. 15.

The Deserted Spouses' and Children's Maintenance Act, c. D-26, s. 2(b)(iii).

(iv) Special actions created by statute

The Consumer Products Warranties Act, c. C-30, s. 30.

The Expropriation Procedure Act, c. E-16, s. 27.

The Matrimonial Property Act, c. M-6.1, s. 30(2).

The Builders' Lien Act, c. B-7.1, s. 19(1).

The Provincial Lands Act, c. P-31, s. 80.

(v) Miscellaneous

The Condominium Property Act, c. C-26, s. 10.4(1).

The Contributory Negligence Act, c. C-31, s. 11.

The Creditors Relief Act, c. C-46, ss. 22(9), 32(b).

The Limitation of Civil Rights Act, c. L-16, ss. 13(2), 30(1).

The Northern Municipalities Act, c. N-5.1, s. 96(4) (S.S. 1983, c. N-5.1).

The Thresher Employees Act, c. T-12, s. 13.

The Wages Recovery Act, c. W-1, s. 22.

4. NOTICE PERIODS TO BE REPEALED

The Commission recommends repeal of the following notice provisions:

1. The Conservation and Development Act, c. C-27, s. 30(2).
2. The Highways and Transportation Act, c. H-3, s. 85(3).
3. The Northern Municipality Act, c. N-5.1, s. 113(6)(b).
4. The Rural Municipalities Act, c. R-26, ss. 376(2), 377(1) & (2), 378.
5. The Urban Municipality Act, 1984, c. U-11, s. 314(2).
6. The Watershed Associations Act, c. W-11, s. 23(2).

5. AMENDMENTS TO THE QUEEN'S BENCH ACT

The subject matter of the following provisions has been incorporated in the proposed Limitation of Actions Act, and should therefore be repealed:

The Queen's Bench Act, c. Q-1, ss. 27(11), 44(11) and 43(1).

X. SYNOPSIS OF MAJOR PROPOSALS

1. At present some tort actions are subject to a two year limitation period, while actions for breach of contract are generally subject to a six year limitation period. This presents a problem because courts have recently recognized that the same action may give rise to overlapping actions in both contract and tort. The Commission proposes that a two year limitation period apply to all personal actions whether in contract or in tort, other than actions in debt and actions for conversion or detention of property which should be subject to a six year limitation period.

2. Under the present Act, periods of limitation governing actions for breach of trust are often difficult to ascertain, particularly where a constrctive trust is involved. The Commission proposes that express, resulting and constructive trusts be treated similarly. A six year limitation period should generally apply to such actions, but the limitations statute should identify more serious breaches that are subject to a ten year limitation period.

3. The provisions of the present Act dealing with land are largely a consolidation of earlier English limitation statutes inherited by Saskatchewan. For the most part, these provisions do not sufficiently take into account the fundamental changes brought about by the enactment of a Torrens system of land registration. For example, under the Torrens system, the vast majority of mortgages are merely charges registered against the mortgagor's title. The present limitations statute sets out a limitation period for the mortgagor's action for redemption; however, this contemplates the earlier system under which legal title was conveyed to the mortgagee. The Commission proposes that limitations law be changed so as to better accommodate land titles law.

   Of particular concern is the limitation period that is to be applied to agreements for sale of land. The Commission recommends that an action by either the vendor or the purchaser under an agreement for sale not be subject to a limitation period. The vendor at any time may bring an action for cancellation, and a purchaser may at any time bring an action to obtain title to the land by tendering the price. The amount required to be paid by the purchaser should, however, be limited to the principal owing together with interest accruing in the six year period following the date when the last payment under the agreement for sale became due.

4. Under the present law, there is considerable confusion regarding the time when a limitation period commences. Originally, the rule was that the plaintiff's lack of knowledge was not relevant: the limitation period began to run when all essential elements had occurred, even though the plaintiff was unaware of the injury or breach. In Canada the judiciary has made a number of significant

inroads into this rule. The Commission proposes a more comprehensive legislative solution. The limitation period for most personal actions should not commence to run until the plaintiff knew or ought to have known the identity of the defendant, the facts upon which the action is founded, and that the injury suffered was significant.

5. Provisions relating to acknowledgment and part-payment are scattered throughout the present Limitation of Actions Act. The Commission proposes that these should be consolidated into a single provision that clearly indicates the circumstances under which an acknowledgment or part-payment will start the time running afresh.

6. A number of the Commission's proposals would result in a postponement, suspension or extension of the running of time which could conceivably keep an action alive for an extremely lengthy period of time. The Commission proposes that an ultimate limitation period of 30 years be imposed beyond which no action may be brought.

7. Under present limitations law, the expriation of a limitation period operates only to bar the remedy; it does not extinguish the right. This distinction has significance in a number of situations (such as the conflict of laws). The Commission is of the opinion that the right/remedy dichotomy should not determine the outcome of these questions. Instead, each situation should be individually examined and an appropriate rule should be developed. There is still, however, a need for a residual rule in the rare case where the distinction may still be relevant. The Commission proposes that the expiration of the limitation period should extinguish the right, since this is in accord with the expectation that the expiration of a limitation period brings the matter to an end.

8. The proliferation of special limitation periods is likely the single greatest problem plaguing limitations law in Saskatchewan. The limitation periods are invariably short and inflexible. The Commission proposes that all actions that are not genuinely unique should be subject to the general limitations statute. The Commission proposes the repeal of many of the special limitation periods presently in existence. For example, the special one year limitation period set out in The Highway Traffic Act that governs an action for the recovery of damages occasioned by a motor vehicle should be repealed. Such an action should instead be governed by the two year limitation period for personal actions that is provided in the proposed statute.

   In addition, the Commission recommends that remaining special limitation periods be made more readily accessible by listing them in schedule to the new limitations act.

9. The Commission proposes a number of other changes that would modernize limitations law, covering such topics as the time period for restitutionary actions and procedural matters such as the

assertion of statute-barred claims in other proceedings and the amendment of pleadings or addition of parties after the expiration of a limitation period.